N 40553-9

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF:

ROBIN SCHREIBER,

PETITIONER.

PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

Robin Schreiber ("Schreiber") challenges his Clark County conviction Second Degree Murder while armed with a firearm and a "law enforcement officer" aggravating factor. Mr. Schreiber is currently incarcerated in the Department of Corrections serving a 374-month sentence. This is his first collateral attack on his judgment.

B. FACTS

The Court of Appeals summarized the facts on direct appeal as follows:

> Over several days in June 2004, Robin Schreiber became increasingly upset over a child support dispute with his ex-wife, Debra Phares. Schreiber's girlfriend, Kim Mortenson, found Schreiber in his bedroom with a shotgun and a bag of ammunition. She took the shotgun from him and had her son call 911. She returned to the bedroom and tried to prevent Schreiber from reaching a rifle stored there, but he pushed her aside. After Mortenson told Schreiber the police had been called, she left the house.
>
> Police officers responded to the call, including Clark County Sheriff's Sergeant Brad Crawford. The officers saw Schreiber moving from room to room inside the house, drinking beer, and knocking out the screens on the upstairs windows. Schreiber pointed a rifle out the window, aiming at the patrol cars and the officers below. Shortly after the police arrived, Schreiber called Phares and told her she did not have to worry about him anymore, that deputies were at his house, and that he had his gun with him.
>
> Eventually, Schreiber came out of the house and crawled toward his truck, carrying the rifle and periodically scanning with it in the officers' direction. Because patrol cars blocked Schreiber's driveway, he drove across an adjoining field and over a barbed wire fence. The fence severed a brake line, leaving him with only 37 percent braking power. From the field, he turned onto a neighbor's driveway and

followed it to the road in front of his house, 114th Street. He was traveling 19 m.p.h. as he turned onto 114th Street.

Meanwhile, Sergeant Crawford drove his patrol car on 114th Street to the point where the road turns 90 degrees to the left, becoming 124th Avenue. He stopped a civilian vehicle that was approaching the turn on 124th and backed his patrol car onto the shoulder at the corner. His car was approximately 473 feet from the driveway where Schreiber turned onto 114th Street.

Four other officers, including Vancouver Police Corporal Duane Boynton, followed Schreiber on 114th Street in their patrol cars with their lights and sirens on. None of them saw Schreiber's brake lights come on as he approached the 90-degree turn where Crawford had parked his patrol car. The three closest officers heard Schreiber's truck accelerating as it approached the turn and saw it steer straight into Crawford's car. Four civilian witnesses on 124th Avenue also saw or heard Schreiber's truck accelerate and drive straight into Crawford's patrol car. Schreiber's truck was traveling at 30 to 40 m.p.h. when it struck Crawford's car. Crawford died from multiple blunt force injuries.

Additional facts, relevant to each claim below, are set forth in their respective sections.

On June 28, 2006, a jury found Mr. Schreiber guilty of second degree (intentional) murder. In addition, jurors returned firearm and "law enforcement officer" special verdicts.

On July 27, 2006, Schreiber was sentenced to a total sentence of 347 months in prison. He appealed. The Court of Appeals affirmed Schreiber's conviction and sentence by an opinion dated October 21, 2008. His petition for review was denied on April 1, 2009. The mandate was issued on April 8, 2009.

This petition timely follows.

C. ARGUMENT

1. MR. SCHREIBER WAS THRICE DENIED HIS RIGHT TO A PUBLIC AND OPEN TRIAL—FIRST, WHEN JURORS WERE GIVEN A "CONFIDENTIAL" QUESTIONNAIRE THAT WAS FILED UNDER SEAL AND SECOND, WHEN MEMBERS OF THE PUBLIC WERE EXCLUDED FROM THE START OF JURY SELECTION BECAUSE THE COURTROOM HAD NO EXTRA ROOM FOR SPECTATORS, AND THIRD, WHEN A JUROR WAS QUESTIONED IN CHAMBERS.

2. MR. SCHREIBER WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT WHEN A JUROR WAS QUESTIONED IN CHAMBERS AND EXCUSED AND WHERE SCHREIBER WAS EXCLUDED FROM THE PROCEEDING.

Facts Relevant to Claim

Jurors were given a "confidential" questionnaire that was placed under seal. *See Appendix A Declarations.* In fact, it is unclear whether the sealed questionnaires are even in the trial record. In any event, a "working" version of the questionnaire states "(t)he information you provide is confidential and for use by the Judge an d the lawyers during jury selection. The questionnaire will be part of the sealed Court file and will not be available for public inspection or use." The questionnaire appears to have included over 100 questions on a variety of topics. In accord with the document's instructions to potential jurors, at no time was the questionnaire available to any member of the public.

The trial judge did not conduct any hearing prior to deciding to conduct this portion of *voir dire* privately. Likewise, Mr. Schreiber was not

asked and did not waive his right to a public and open trial with respect to the questionnaires. *See Appendix A.*

A large venire was summoned for this case. At first, potential jurors were all taken to a large courtroom. Then, jurors were divided into three groups and questioned in Judge Harris' usual courtroom. When these three groups of potential jurors were first brought into Judge Harris' courtroom, all of the spectators were asked to leave because there was no room remaining for spectators. *Id.* The trial court did not conduct any hearing and there is nothing in the record suggesting the court ever considered an alternative to closing the courtroom during this portion of jury selection.

During the course of jury selection and just before a lunch break, the judge asked the lawyers (but, not Schreiber) to accompany him into chambers to question a single juror. *Id.* Apparently, the Court felt the juror was biased and should be excused for cause—which is what happened although no record was apparently mad of the proceeding. Likewise, no hearing preceded the Court's decision to question the individual juror privately. Not only was Mr. Schreiber not asked by the Court whether he wished to waive his right to an open and public trial during the private *voir dire*, he was not asked and did not waive his right to be present when the individual juror was excused for cause. *Id.*

Basic Principles Found in the Closed Courtroom Cases

Schreiber starts with a brief overview of the settled law—the common legal principles in closed courtroom cases as set forth in the two most recent Washington Supreme Court cases: *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); and *State v. Momah,* 167 Wn.2d 140, 217 P.3d 321 (2009).

The right to an open and public trial includes jury selection. *Strode*, 217 P.3d at 314; *Momah*, 217 P.3d at 327 ("the right to a public trial applies to all judicial proceedings, including jury selection"). The state and federal constitutions guarantee a criminal defendant the right to a public and open trial—a right which extends to pretrial proceedings, including *voir dire*. *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the there was no room in the courtroom for spectators during voir dire and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system). As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984), "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system."

Following this logic, the right to open and public proceedings applies equally to jury selection conducted orally and in writing.

A Bone-Club hearing must be conducted before the courtroom is closed. It cannot be conducted by the appellate court for the first time on review. *Strode,* 217 P.3d at 314-15; *Momah,* 217 P.3d at 329. In *Strode,* the Supreme Court held "the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents us from determining whether conducting part of the trial in chambers was warranted." 217 P.3d at 315.

No objection is necessary to preserve a closed courtroom claim. Instead, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. *Strode,* 217 P.3d at 315;

Likewise, *a defendant's failure to lodge a contemporaneous objection at trial does not constitute a waiver. Id.*

A de minimis exception does not exist. Interviewing only a small number of jurors in a closed courtroom is a violation of the constitutional right. For example, in *Strode* the court rejected the State's argument that the closure of a trial for only a portion of jury selection is too trivial to implicate the constitutional rights at issue here. 217 P.3d at 316 (In Strode, at least 11 prospective jurors were examined in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. "This closure cannot be said to be brief or inadvertent.").

Where the trial court closes a court without a Bone-Club hearing, reversal is required. Denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed. *Strode*, 217 P.3d at 316; *Momah*, 217 P.3d at 326-27. Absent the *Bone-Club* inquiry, the defendant cannot knowingly, intelligently or voluntarily waive the right to a public trial. *Strode*, at 316; *Momah*, at 326-27.

Strode and Momah Reaffirm that Closure Without a Bone-Club Hearing Constitutes a Structural Error Mandating Reversal

Although the Supreme Court could have made the distinction much more clear, the legal line that separates *Momah* from *Strode* is that in *Momah*, the Court conducted a *Bone-Club* hearing or at least its equivalent; and in *Strode*, no *Bone-Club* hearing took place.

When a *Bone-Club* hearing takes place in the trial court, the issue on appeal is whether the court abused its discretion in weighing the factors warranting closure. On the other hand, when no hearing takes place, the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents a reviewing court from determining whether conducting part of the trial in chambers was warranted. Likewise, where a trial court conducts a *Bone-Club* hearing prior to closing the courtroom, it can secure a knowing, intelligent and voluntary waiver of the constitutional right from the defense. Where it does not, it cannot.

Justice Fairhurst's (the swing vote) concurring opinion in *Strode* explains why *Strode* was reversed and *Momah* affirmed: the conduct of a hearing in one case, but not the other. The *Strode* concurrence notes that "(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court." "Even if the requirements were not sufficiently satisfied on the record in *Momah,* the court could properly conclude that the defendant waived his public trial right." *Strode,* 217 P.3d at 318 (Fairhurst, J. concurring). While the *Bone-Club* factors could have been more explicitly detailed in the record, Justice Fairhurst's concurring opinion (in *Strode*) concluded:

> The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in Momah's case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude-the right to an impartial jury.

Id.

The concurring opinion then recited the facts which upheld the trial court's decision to close the courtroom.

> Prior to *voir dire*, the defendant was expressly advised that *all proceedings* are presumptively public. Nonetheless, the defense affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this. At no time did the defendant or his counsel indicate in any way that any of the proceedings held in a closed room that was not a courtroom violated his public trial right. The record shows the defendant intentionally relinquished a known right.

Id. (emphasis in original).

In contrast, "(u)nlike the situation presented in *Momah,* here [in *Strode*] the record does not show that the court considered the right to a public trial in light of competing interests." And, "(t)he record does not show a knowing waiver of the right to a public trial." *Strode,* at 318.

The opinion in *Momah* reinforces this distinction.

The *Momah* court noted that previous reversals occurred where "(t)he court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom." 217 P.3d at 327. In contrast, "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it." *Id.* In short, a closure hearing took place. "Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution." *Id.* During the hearing, (d)efense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning." *Id.* at 329. And, the trial court's decision to close the courtroom was supported by the facts: "Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests." *Id.* at 329.

While an adequate hearing took place in *Momah* prior to the closure of the courtroom, the Court reminded that "(i)n order to facilitate appellate review, the better practice is to apply the five guidelines and enter specific findings before closing the courtroom." *Id.* at 327, n.2.

Although the dissent took a different view of the *facts*, it agreed that the *legal* outcome turned on whether an adequate hearing took place. "Except for Momah's tacit participation in the closed-door questioning, there is no support in the record for any of these conclusions." *Id.* at 329 (Alexander, C.J., dissenting).

Thus, *Momah* stands for the proposition that while closure of the courtroom after a hearing implicates a constitutional right, it does not mandate reversal where the court weighed the relevant concerns before closure and where the defendant clearly waived one constitutional right in favor of another. "The closure occurred to protect Momah's rights and did not actually prejudice him." *Id.* at 329. On the record, the trial court considered and weighed the relevant criteria. "The court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of *voir dire* to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial." *Id.* at 329.

In contrast, the trial court in *Strode* did not conduct a constitutionally

meaningful pre-closure hearing, reversal was required—there was "no indication in the record that the trial judge engaged in the required *Bone-Club* analysis or made the required formal findings of fact and conclusions of law relevant to the *Bone-Club* criteria." *Strode,* 217 P.3d at 315. *See also* 217 P.3d at 313.

It was not enough in *Strode* for the State to suggest to the appellate court post-*hoc* reasons supporting closure, even if those reasons arguably benefit the defendant. The findings must be made by the trial court, prior to closure. "Although the trial judge mentioned several times that juror interviews were being conducted in private either for 'obvious' reasons, to ensure confidentiality, or so that the inquiry would not be 'broadcast' in front of the whole jury panel, the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right." 217 P.3d at 315.

Put another way, where there is no *Bone-Club* hearing, "the merit of the closure is not the issue. Instead, we focus only on the procedure used by the trial court prior to closure." *Id.* at 316, n.5.

This Case Mirrors Strode (and Orange), Not Momah.

In this case, the trial court closed the courtroom three times. The trial was "closed" when prospective jurors answered a large number of questions privately—none of which could be viewed by the public. The courtroom was closed to the public during the time that jurors filled all of

the courtroom seats. Third and finally, the courtroom was closed when the court questioned a single juror in chambers. None of the three decisions to close the courtroom was preceded by the requisite hearing and findings by the court. Applying *Strode* and *Momah* to the facts in this case mandates reversal.

There Was No Pre-Closure Hearing in This Case

Where there is no pre-closure hearing, neither the failure to object, nor participation in *voir dire* constitutes a waiver. In *Strode,* the State contended that because Strode and his attorney were present and participated during this individual questioning, Strode waived his right to argue that his right to a public trial had been violated. The Court rejected this argument. "Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial." 217 P.3d at 315.

Instead, the "right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner." *Id.* at 315, n.3.

Each of the three closures in this case merit reversal—even considered separately. Considered together, it shows a consistent denial of

Schreiber's public and open trial rights.

Schreiber Was Also Denied His Right to be Present

However, the constitutional rights to an open and public trial were not the only rights violated during jury selection. In addition, Schreiber's right to be present for a portion of his trial was violated when a juror was questioned in chambers without Schreiber present.

A criminal defendant has a due process right to be present at every stage of trial where his absence might frustrate the fairness of the proceedings. *See United States v. Gagnon,* 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). The constitutional right, which is the right to be present at every "critical stage" of the trial, is based in the Fifth Amendment Due Process Clause and the Sixth Amendment Right to Confrontation Clause. *See La Crosse v. Kernan,* 244 F.3d 702, 707-08 (9th Cir. 2001).

Jury selection is a critical stage of a trial. Schreiber's presence at the questioning of this juror could have made a meaningful difference in the outcome. The improper excusal of even a single juror is an error which is never harmless. *Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).

For all of the reasons noted above, reversal is required.

3. Mr. SCHREIBER WAS DENIED HIS RIGHTS TO A PUBLIC TRIAL, HIS RIGHT TO BE PRESENT, AND HIS RIGHT TO COUNSEL WHEN THE COURT INSTRUCTED THE BAILIFF TO HAVE A PRIVATE CONVERSATION WITH A JUROR RELATING TO THE FITNESS OF THE JUROR TO SERVE.

Facts

During trial and apparently in response to a statement from a juror to the court's bailiff that the juror could "not do this," the court directed the bailiff to speak privately to the juror in the jury room. *See Appendix A Declarations.* Obviously, Schreiber does not know what was said—either by the juror or by the bailiff. Neither he nor his attorney was present. However, after this private conversation, the bailiff told the court that the juror was "good to go." *Id.*

Mr. Schreiber now seeks an evidentiary hearing (RAP 16.11) and reversal as a result.

Argument

"As a general rule, a trial court should not communicate with the jury in the absence of the defendant." *See State v. Bourgeois,* 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). A bailiff is forbidden to communicate with the jury during deliberations except to inquire if it has reached a verdict, or to make innocuous or neutral statements. *State v. Booth,* 36 Wash.App. 66, 68, 671 P.2d 1218 (1983). When an *ex parte* communication occurs, the trial court generally should disclose the communication to counsel for all parties. *State v. Johnson,* 125 Wn. App.

443, 105 P.3d 85 (2004). Although an improper communication between the bailiff and the jury is a constitutional error, the communication may be so inconsequential as to constitute harmless error. *Id.*

Once a defendant raises the possibility that he or she was prejudiced by an improper communication between the court and the jury, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. Here, an evidentiary hearing is required. RAP 16.11.

A reviewing court cannot consider a juror's statement as to whether the communication influenced the jury; "we can only attempt to discover what was said and examine the remarks for their possible prejudicial impact." *Booth,* 36 Wash.App. at 69.

To illustrate, this Court reversed in *Johnson, supra,* despite the fact that the record was unclear as to what was said by the bailiff to two jurors:

> Here, the bailiff spoke with the foreperson to inquire how deliberations were proceeding and to offer suggestions for making the process run more smoothly. These actions were highly improper.
>
> As well, the court failed to notify defense counsel regarding these communications and denied defense counsel's motion for a full evidentiary hearing on the circumstances of the juror's removal, the bailiff's contacts with the jury, and the trial court's communications with the panel during deliberations. This denied the defense the opportunity to investigate or present a complete factual record. This error cannot be presumed harmless. We reverse and order a new trial before a different judge.

Id. at 461. The remedy at this juncture in this case is plain and simple. This Court should remand for an evidentiary hearing. RAP 16.11. Only

then can this Court accurately assess the comments made and the resulting prejudice.

4. THE TESTIMONY OF A STATE CRIME LAB EMPLOYEE (ANN MARIE GORDON) VOUCHING FOR TEST RESULTS CONDUCTED BY ANOTHER EMPLOYEE WHO WAS NOT PRESENT AT TRIAL OR SUBJECT TO CROSS-EXAMINATION VIOLATED SCHREIBER'S RIGHT TO CONFRONTATION.

5. MR. SCHREIBER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, WHEN APPELLATE COUNSEL FAILED TO ASSIGN ERROR TO THE VIOLATION OF SCHREIBER'S CONFRONTATION RIGHT.

7. NEWLY DISCOVERED EVIDENCE REGARDING THE CRIME LAB EMPLOYEE/WITNESS'S CHRONIC MIS- AND MALFEASANCE JUSTIFIES A NEW TRIAL

Ann Marie Gordon, a former Washington State Patrol Crime Laboratory employee who resigned in disgrace after this trial, testified twice for the State—in the state's case-in-chief and as rebuttal witness. Ms. Gordon repeated vouched for her own expertise. She testified about her credentials, background, and job responsibilities, which include day-to-day operations of the lab – both the scientific and administrative staff. She also testified that she was responsible for writing the standard operating procedure, insisting to jurors that any test associated with her work, whether she personally performed it or not, was completely trustworthy and reliable. She told jurors she had testified in hundreds and hundreds of cases, and how the lab handles about 10,000 cases a year. RP 2386 - 2400. Ms. Gordon testified about the process of testing the blood for alcohol,

which is called space gas chromatography. She indicates it is a "state-of-the-art analytical chemistry for volatiles." RP 2404.

Unlike most of the cases where a forensic scientist testified about blood alcohol content levels, in this case the defense theory attempted to show that Schreiber's BAC was higher than the test results testified to by Ms. Gordon. However, even if the roles were reversed, the stakes were still the same. The BAC results were highly relevant to the outcome in this case.

According to Ms. Gordon's testimony, another lab technician, Mr. Lewis, initially conducted the testing of a blood seized from Schreiber in order to determine the alcohol content. Despite the fact that she did not do the testing and Mr. Lewis did not testify, Ms. Gordon testified to the accuracy of that test claiming that she reviewed the data and thereby made sure the testing was done correctly. RP 2408.

Ms. Gordon then re-tested the substance because Mr. Lewis wasn't available to testify about his results. RP 2408. Ms. Gordon explained that re-testing is not unusual, and when she has done it before, "quite frankly, I've never seen any---I've always gotten the same result, as I did in this case." RP 2409.

Ms. Gordon then testified the first blood alcohol test results were .136 and .134, which she rounded up to .14. RP 2410. She re-tested the

sample two years later and received a result of .13, which she opined meant that the first result was accurate. RP 2411.

Given subsequent revelations, the entirety of Ms. Gordon's testimony is suspect. *See Appendix B.*

In July 2004, the Seattle *Post Intelligencer* published a series of articles outlining several problems with the crime lab. *See Appendix B.* Most importantly for purposes of this case, the reports revealed significant problems with the oversight of WSP Crime Lab employees.

In March 2007, the first of two anonymous tips from a whistleblower led to an investigation of the WSP Toxicology Lab. Dr. Logan asked lab scientist Ann Marie Gordon to lead the investigation into the accusation that lab employees were falsifying reports, that evidence was being destroyed, and that protocol was not being followed. In April 2007, Ms. Gordon reported that she had completed her investigation, revealing no fraud.

In July 2007, a second tip was received asking to investigate Ms. Gordon's performance more closely (suggesting that if her schedule was compared against some of her signed certificates that it would show fraud). When Dr. Logan met with Ms. Gordon to inform her that another investigation would be commenced, Ms. Gordon admitted that she had acted fraudulently, signing certificates for work she had not performed, including stating that she had calibrated machines when she had not done

the work (*i.e.,* one of the aspects of the testing that Ms. Gordon assured Schreiber's jurors had been correctly performed because it always was). Ms. Gordon resigned on July 20, 2007.

As a result, several requests were made to conduct a full investigation of the State Patrol crime lab. The Washington Foundation for Criminal Justice stated: "It represents a departure from integrity so profound that you can't believe anything about the lab."

In January, 2008, a panel of judges in King County ruled that "the work product of the WSTL (Washington State Toxicology Lab) has been so compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the WSTL simulator solution work product would not be helpful to the trier of fact." *State v. Ahmach, Ruling* at 25.

Included in the judges' ruling were a number of findings highly relevant to the case at bar:

> a. Lab Manager Gordon had been taught by her predecessor to falsify test results conducted by other scientists;
>
> b. Director Dr. Logan was aware of this practice as early as 2000;
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> c. Although Dr. Logan and Ms. Gordon discussed the impropriety of this practice, in 2003, Ms. Gordon adopted the practice herself;
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> d. At least two other employees adopted the practice;

e. The tests in question were run through the gas chromatograph;

f. Worksheets from machine testing were often drafted weeks later by personnel not present when the tests were conducted. These worksheets were inaccurate in some cases;

g. Declarations for certification of the solutions were prepared by support personnel and then signed by the analysts—sometimes weeks later. There were at least 150 instances of non-software related errors discovered.

h. In one instance, a gas chromatograph machine was malfunctioning, resulting in abnormal readings. This machine remained online for some time despite the fact that individual toxicologists knew it was not functioning properly;

i. Results from a 2004 audit revealed the following conclusions:

i. The WSLT was noncompliant with policies and procedures in eight major categories;
ii. The simulator solutions logbooks were not properly kept;
iii. The required self-audits were not performed;
iv. Lab Manager Gordon indicated she did not have time to follow WSP policies and would not do so;
v. WSP policies and required procedures appear to be of secondary concern to lab personnel;

j. Results from a 2007 audit revealed the following conclusion: "The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures."

These and other factors led the panel of judges to conclude the WSTL had developed a culture of compromise. Calling the problems with the lab "pervasive," the judges summarized their concerns to include a failure to

"pursue an ethical standard" expected of an agency that serves as an integral part of the criminal justice system; the failure to create and abide by procedures to catch and correct human error; and the failure to maintain scientific standards reasonably expected of an agency involving critically probative evidence.

The application of the information underlying these conclusions to Mr. Schreiber's case is obvious. Keeping in mind that the employee who initially handled and tested the blood sample was not available for cross-examination in Schreiber's trial, in 2007 the Risk Management Division included the following findings in their "Report to the Chief":

a. The evidence storage area was accessible to anyone;

b. The evidence vault door was often propped open;

c. There was no record of who entered the storage area;

d. Auditors observed the removal of items without appropriate accompanying notations;

e. Accountability to the chain of custody was noticeably absent;

f. Minimal chain of custody directives existed;

g. An environment of non-compliance with protocol developed;

h. Personnel were not held accountable for failing to follow directives;

i. Dr. Logan failed to implement changes suggested in 2005.

Additional documentary evidence of Ms. Gordon's chronic mis- and malfeasance is set forth in the Appendix B.

Argument

Ms. Gordon's testimony and the subsequent revelations about the performance of her job duties give rise to two claims. First, Ms. Gordon's testimony vouching for a surrogate violated Schreiber's right to confrontation. Next, newly discovered evidence also merits a new trial.

Confrontation Claim

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The Sixth Amendment's Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington,* 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The United States Supreme Court's opinion in *Melendez-Diaz* v. *Massachusetts* means what it said, and said what it means: "[a] witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." __ U.S. __, 129 S. Ct. 2527, 2531 (2009). For that reason, the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without

affording the accused an opportunity to "'be confronted with' the analysts at trial." *Id.* at 2532 (quoting *Crawford*, 541 U.S. at 54).

In *Crawford, supra,* the Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, the Supreme Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

The use of the definite article (confront *the* witnesses) in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person who actually made the statement or authored the document at issue. *Crawford*, 541 U.S. at 68. Accordingly, the United States Supreme Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police

officer. *See id.*; *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a "competent witness" to answer general questions regarding someone else's forensic declarations, such as "systemic problems with the laboratory processes" that the person used. But the Confrontation Clause guarantees more than that. As the Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis" and "weed out . . . incompetent [analysts] as well." *Id.* at 2537 (citations omitted).

The holding of *Melendez-Diaz*, in fact, effectively resolves the claim presented here. There, this Court explained that "[a] witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or,

if the witness is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' the analysts at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation . . . .") (emphasis added). The inescapable implication of this holding – as even the dissent acknowledged – is that the analyst who wrote "those statements that are actually introduced into evidence" must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

Crawford does not simply require an opportunity for cross-examination of someone who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant's statements directly. *Crawford,* 541 U.S. at 61. Hence, as a leading treatise explains, "Crawford's language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." D.H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE § 3.10.3, at 57 (Supp. 2009).

> To use [testimonial] information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases skepticism about the expert's conclusions.

THE NEW WIGMORE, supra, § 3.10.8, at 53.

Thus, as courts and commentators have recognized, it is simply "nonsense" to claim that a forensic report introduced to provide a basis for some other analyst's in-court testimony is not introduced for the truth of the matter asserted. *Id.* at 54; see also *People v. Goldstein*, 6 N.Y.3d 119, 128 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 828, 855-56 (2008) ("[I]t is not logically possible for a jury to use the hearsay statements to assess the weight of the expert's opinion other than by considering their truth").

In the wake of *Melendez-Diaz*, two state supreme courts and one federal court of appeals have held that the Confrontation Clause prohibits what might be called "surrogate" forensic testimony – that is, introducing one forensic analyst's testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009), the

defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst "to recite [another's] findings and conclusions on direct examination." *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is "plainly . . . asserting the truth of" the nontestifying analyst's findings in a manner that triggers the defendant's constitutional right to confrontation, *id.* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying "expert witness's testimony [to be] confined to his or her own opinions." *Avila,* 912 N.E.2d at 1029. When a forensic examiner, "as an expert witness . . . recite[s] or otherwise testif[ies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report," the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear*, 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford*'s basic rule that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross- examine the declarant," the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a]

defendant's constitutional right to confront the witnesses against him." *Id.* at 304-05 (emphasis added); *see also State v. Galindo*, 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confron-tation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that has held that although a surrogate forensic analyst may testify based on raw data someone else generated, the "conclusions" of the nontestifying analyst who performed the testing are testimonial statements that must be "kept out of evidence." *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *cert. denied*, 129 S. Ct. 40 (2008). Reaffirming that ruling in a case after *Melendez-Diaz*, the Seventh Circuit held that a forensic analyst's testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because "[the second analyst's] report was not admitted into evidence." *United States v. Turner*, ___ F.3d ___, 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had "not [been] involved in the testing process" at issue and the prosecution had introduced the second analyst's certificate of analysis. *Id.* at *4-*5.

Intermediate courts in three states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne*, 774 N.W.2d 714 (Mich. Ct.

App. 2009); *Wood v. State*, ___ S.W.3d ____, 2009 WL 3230848 (Tex. Ct. App. Oct. 7, 2009); *Hamilton v. State*, ___ S.W.3d ____, 2009 WL 2762487 (Tex. Ct. App. Aug. 31, 2009); *Cuadros-Fernandez*, ___ S.W.3d ____, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009); *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).

The claim presented also directly implicates the truth-seeking function of trial. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories.

There are compelling, additional, "real world" reasons why the right to confront a forensic scientist is integral to the truth finding function. Over the past 35 years, a belief has taken hold in the criminal justice system that critical elements of any given case can be conclusively and irrefutably resolved through the use of forensic evidence. This belief stems from the assumption that state forensic examiners are highly-trained scientists, who conduct widely-recognized tests, and can then provide an objective and unimpeachable report about their results for use in criminal trials. The supposedly objective and "neutral" nature of these reports render the need for direct testimony and cross-examination superfluous.

This is unfortunately not true—in general or in this specific case, as the following section provides.

However, even if all forensic examiners operated under ideal "scientific" circumstances—solid techniques performed by qualified professionals, conducted in an accredited laboratory with meaningful supervision and controls—their reports would still be subject to the same dangers that prompted the Framers to adopt the Confrontation Clause in the first place. This is because, at bottom, the evidentiary worth of forensic evidence cannot be boiled down to a simple mathematical calculus. Instead, the probative value of forensic evidence always depends on a variety of factors, including the training and skill of the forensic examiner, the validity and reliability of the technique, the precision of the recording methods, the existence of supervisory controls, and the absence of context and confirmation bias undermining the accuracy and objectivity of the forensic examiner in reporting the results.

As the *Melendez-Diaz* decision points out, the trials of the wrongly convicted reveal a widespread pattern of forensic errors. Although some of these errors involve forensic practices that have given way to new testing methods, there is no reason to believe these errors are purely or even largely a function of technology. As the Framers recognized more than 200 years ago when they included the Confrontation Clause in the Bill of

Rights, simple mistakes and even more culpable ones are likely to continue regardless of how much technological progress occurs. Technological advances cannot eliminate the forensic errors that have plagued the exoneration cases, and these errors highlight the need for the sort of vigorous confrontation right the Court has described in its *Crawford* line of cases.

Confrontation is the best mechanism yet devised for safeguarding against precisely the sorts of witness mistakes, overreaching, bias and outright fabrication exposed by the exonerations and their aftermath. Indeed, these are precisely the sorts of errors most likely to occur when, as often occurred during the *Ohio v. Roberts* era, the state's testimonial evidence is shielded from the opportunity for adversarial scrutiny. *See e.g., Pointer v. Texas,* 380 U.S. 400, 404 (1965) (importance of confrontation in exposing falsehood); *Delaware v. Van Arsdall,* 475 U.S. 673, 682-83 (1986) (importance of confrontation in exposing bias); *see generally Crawford v. Washington,* 541 U.S. 36, 61-62 (2004) (describing confrontation as "procedural" guarantee that reflects Framers' substantive judgment about "how reliability can best be determined.").

The *Melendez-Diaz* decision articulates the very problem found in the Schreiber case. The accuracy of the testing required certain protocols to be followed and allowed for at least some level of subjective analysis.

Like the *Melendez-Diaz* case, Gordon (or whoever actually conducted the tests) used chromatography mass spectrometry analysis. The Supreme Court specifically stated that such testing is subject to judgment by the person conducting the test.

> "At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. See 2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03[c], pp. 532-533, ch. 23A, p. 607 (4th ed.2007) (identifying four "critical errors" that analysts may commit in interpreting the results of the commonly used gas chromatography/mass spectrometry analysis); Shellow, The Application of *Daubert* to the Identification of Drugs, 2 Shepard's Expert & Scientific Evidence Quarterly 593, 600 (1995) (noting that while spectrometers may be equipped with computerized matching systems, "forensic analysts in crime laboratories typically do not utilize this feature of the instrument, but rely exclusively on their subjective judgment")

Id. at 2537-38.

Because this issue should have been raised on direct appeal, appellate counsel was ineffective. As a result, the question posed is two-fold: was appellate counsel's failure to raise the claim deficient; and was there a reasonable likelihood of a different outcome on appeal if counsel had raised the issue. A violation of the Confrontation Clause is a constitutional error. On direct appeal, the State would have been required to show that the error was harmless beyond a reasonable doubt. Given the centrality of Schreiber's blood alcohol content to the issues in trial, the State could not surmount that burden.

Newly Discovered Evidence Claim

Under RAP 16.4, a PRP court "will grant appropriate relief to a petitioner" if "[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding." RAP 16.4(a), (c)(3). The familiar test for newly discovered evidence requires a petitioner to establish: "that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching.

After trial, numerous revelations came to light regarding Ms. Gordon's long history of fraud. That evidence easily satisfies all five concerns necessary for a new trial. At a minimum, Schreiber has made a sufficient showing to justify an evidentiary hearing.

8. THE JUDGE AND A JUROR SLEPT THROUGH PORTIONS OF THE TRIAL. THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING. IF THE REFERENCE HEARING JUDGE DETERMINES THE TRIAL JUDGE SLEPT THROUGH ANY PORTION OF TRIAL, REVERSAL IS REQUIRED. IF A JUROR SLEPT THROUGH MATERIAL PORTIONS OF TRIAL, REVERSAL IS ALSO REQUIRED.

9. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FULLY INVESTIGATE AND SEEK A MISTRIAL BASED ON THESE IRREGULARITIES.

Facts

A juror—the presiding the juror—slept through significant portions of trial. Both Mr. Schreiber and his brother, who was seated in the audience for a large potion of the testimony, observed her sleeping sometimes for several minutes. Both Mr. Schreiber and his brother would have been able to describe the juror's actions, which were consistent only with sleeping and inconsistent with any legitimate explanation. The juror slept through important trial testimony. Unfortunately, the juror was not the only sleeper during trial.

The trial judge slept, too. *Id.* On several occasions and always in the afternoons, the trial judge dozed off for shorter periods of time, but during the conduct of the trial. *Id.*

Argument

A trial consists of a contest between litigants before a judge. When the judge is absent at a "critical stage" the forum is destroyed. *Gomez v. United States,* 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). There is no trial. The structure has been removed. There is no way of repairing it. The framework "within which the trial proceeds" has been eliminated. *See Arizona v. Fulminante,* 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The verdict is a nullity. *Gomez,* 490 U.S. at 876.

A slightly different test applies to a sleeping juror. For example,

United States v. Springfield, 829 F.2d 860 (9th Cir. 1987), holds that the presence of a sleeping juror during trial does not, per se, deprive a defendant of a fair trial. Cast another way, *Springfield* makes clear that the presence of all awake jurors throughout an entire trial is not an absolute prerequisite to a criminal trial's ability to "reliably serve its function as a vehicle for determination of guilt or innocence." A single juror's slumber is not *per se* plain error. *See also State v. Hughes,* 106 Wn.2d 176, 721 P.2d 902 (1986).

Mr. Schreiber has presented sufficient evidence to justify an evidentiary hearing on these two related claims. If the judge slept through any portion of trial, he was functionally absent—a structural error mandating reversal. Likewise, Schreiber contends that the presiding juror did not hear significant testimony. If he can establish either of these claims at a hearing, then he is entitled to a new trial.

10. MR. SCHREIBER'S RIGHT TO CONFRONTATION WAS DENIED WHEN THE TRIAL COURT REFUSED TO PROVIDE SCHREIBER WITH THE PSYCHOLOGICAL RECORDS OF CORPORAL BOYNTON RELATED TO THIS CASE. THIS COURT SHOULD REVIEW THE DOCUMENTS PLACED UNDER SEAL AND REVISIT THIS ISSUE BECAUSE THE COURT INCORRECTLY UNDERSTOOD THE HARM STANDARD ON DIRECT REVIEW.

On direct appeal, Schreiber assigned error to the trial court's order limiting his cross examination of Corporal Boynton, who witnessed the collision as he followed Schreiber in his patrol car. Schreiber sought, but was denied access to Boynton's psychological file, which was placed under

seal. Schreiber claimed that the limitation was unreasonable and violated his right to confrontation. He also argued that the psychologist-client privilege should yield to Schreiber's confrontation right because Boynton was a crucial witness for the State and information about the incident's psychological impact on Boynton was relevant to his reliability and credibility as a witness. Boynton had sought counseling to deal with the trauma of the incident. Schreiber moved to disclose the psychologist's identity and the counseling records. He stated that he "would not be opposed" to the trial court conducting an *in camera* review of the records to determine whether Schreiber could review them and use them in his cross examination. RP 17. After reviewing the records, the trial court stated that they were sealed. Those records were apparently not transmitted to this Court on direct appeal—despite the fact that Schreiber raised a confrontation claim that depended on the content of those records.

This Court denied Schreiber's claim, holding that any error in limiting Schreiber's cross examination of Boynton was harmless. "A confrontation clause violation is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error."

Because this Court's evaluation of the potential harm to Schreiber could only be made after reviewing the sealed records, Schreiber respectfully seeks to have this Court revisit the issue after the records are

transmitted to this Court.

It is important to note that this Court's formulation of the harm standard in evaluating a confrontation clause claim based on the failure to permit sufficient cross-examination was erroneous.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Idaho v. Wright,* 497 U.S. 805, 813, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Criminal defendants receive two valuable protections from the Confrontation Clause-the right to physically face those who testify against them and the right to cross-examine those witnesses. *Coy v. Iowa,* 487 U.S. 1012, 1016-17, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). These protections are fundamental requirements for a fair trial. *Pointer v. Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

A petitioner is entitled to relief on an alleged confrontation violation only if he shows that the trial court in fact violated his right to confrontation and that "there is more than a mere reasonable possibility that the [error] contributed to the verdict." *Brecht v. Abrahamson[,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

The correct inquiry where the scope of cross-examination is unreasonably curtailed is whether, *assuming that the damaging potential of the cross-examination were fully realized,* a reviewing court might

nonetheless say that the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdale*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674, 54 (1986).

Because that damaging potential can only be accurately assessed by this Court's review of the sealed documents, this Court should do so.

11. THE EVIDENCE OF A "NEXUS" BETWEEN A FIREARM AND THE CRIME OF MURDER WAS INSUFFICIENT AS A MATTER OF LAW.

12. THE FIREARM ENHANCEMENT INSTRUCTIONS WERE AMBIGUOUS—PERMITTING JURORS TO CONVICT ON MUCH LESS EVIDENCE THAN WAS LEGALLY REQUIRED.

13. MR. SCHREIBER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN APPELLATE COUNSEL FAILED TO ASSIGN ERROR TO EITHER OF THE ABOVE CLAIMS.

Facts

At trial, Schreiber moved to strike the firearm enhancement for lack of a nexus. RP 78 – 90. In response, the State argued that enhancement penalties can be imposed "whenever a gun or firearm or other deadly weapon is available to a defendant – readily available to a defendant."

In its opening statement, the prosecution stated: "Defendant is heading west. He was... his ability to turn south between the trees and the house are blocked by officers, blocked by Boynton. He looks over at Officer Boynton as he's slowing his truck trying to make that turn, and he raises the rifle up and shows it to Officer Boynton. RP 496.

The defense moved, after the state rested, to dismiss the firearm enhancement, claiming a lack of proof. RP 2534 – 2535. The State successfully argued the link between the firearm and the crime is simply there was a gun present during the time of the crime – murder. RP 2536.

Schreiber objected to the firearm instructions. RP 3262. The instruction required only a "connection" between the crime and the firearm.

During closing argument, the State referenced the defendant possessing the firearm while in the house. RP 3285; 3317; 3319 ("now, what was happening back at the house? We know that he was aiming a rifle at deputies. We don't know that he was aiming at Sergeant Crawford, but he was aiming at deputies."); and 3422 (rebuttal argument); 3423 (rebuttal argument).

During the state's rebuttal argument, the prosecutor stated: "And what we know is --- and I'll get back to this a little bit later – he's still upset, irritated, he's got the gun, got the rifle, got the pockets of ammunition, got the bandolier with the extra ammo on it, got the loaded rifle with him --- and what he does is he flees and he pulls out on 114th. RP 3424. "They pull him out of the car, they get him into custody, they arrest him, they search him, they find the pockets of ammo that he's loaded up with him, they find the rifle inside, see it laying inside the truck, just inside the door. And as you'll remember from their different perspectives, you've

even go witnesses (inaudible), civilian and officers who say when he got out he turned back towards that car again where that rifle was. RP 3427.

After the verdict, the presiding juror admitted to defense counsel and his investigator that jurors interpreted the word "connection" to require only the presence of a gun during the commission of the crime. However, defense counsel was later unable to locate the juror to have her sign a declaration recounting what she told counsel. *See Declaration of Phelan.*

Washington courts have recognized that the mere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed. *State v. Barnes,* 153 Wash.2d 378, 383, 103 P.3d 1219 (2005); *State v. Schelin,* 147 Wash.2d 562, 567, 570, 55 P.3d 632 (2002); *State v. Gurske,* 155 Wash.2d 134, 138, 118 P.3d 333 (2005).

A person is armed with a deadly weapon if it is easily accessible and readily available for use for either offensive or defensive purposes. *State v. Easterlin,* 159 Wash.2d 203, 208-09, 149 P.3d 366 (2006); *Barnes,* 153 Wash.2d at 383, 103 P.3d 1219; *Gurske,* 155 Wash.2d at 137, 118 P.3d 333; *State v. Valdobinos,* 122 Wash.2d 270, 282, 858 P.2d 199 (1993). Critically for this case, there must be a nexus between the defendant, the crime, and the weapon. *Easterlin,* 159 Wash.2d at 209; *Gurske,* 155 Wash.2d at 140-41, 142; *State v. Willis,* 153 Wash.2d 366, 373, 103 P.3d

14. MR. SCHREIBER WAS CONVICTED OF A LEGISLATIVELY UNAUTHORIZED AGGRAVATING FACTOR.

15. APPLYING THE "POLICE OFFICER" AGGRAVATOR TO MR. SCHREIBER, WHICH WAS LEGISLATIVELY AUTHORIZED AFTER THIS CRIME OCCURRED, VIOLATES THE CONSTITUTIONAL PROTECTION AGAINST EX POST FACTO LAWS.

Mr. Schreiber was convicted and sentenced for a crime that did not exist—one that was not authorized by the Legislature. At the time of his crime (July 30, 2004), the "law enforcement officer who was performing his official duties" aggravating element was not legislatively authorized for any crime other than aggravated murder found in RCW 10.95. The law changed before Schreiber was tried. While the so-called "Blakely fix" legislation made a procedural change (authorizing a jury trial), it also made substantive changes (creating new elements of more serious crimes).

This Court has made it very plain what must happen as a result of a conviction for a non-existent crime: Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face. *In re Pers. Restraint of Hinton,* 152 Wn.2d 853, 857, 100 P.3d 801 (2004). This Court further stated:

> The petitioners have thus been convicted of crimes under a statute that, as construed in *Andress,* did not criminalize their conduct as second degree felony murder. Because they have been convicted of nonexistent crimes, they have shown fundamental constitutional error that actually and substantially prejudiced them. The petitioners are entitled to relief. It has long been recognized that a judgment and sentence based on conviction of a nonexistent crime entitles one to

> relief on collateral review. Moreover, in *In re Personal Restraint of Carle,* the court held that the petitioner was entitled to relief from a sentence not authorized by law, observing that a court has the power and duty to correct such an erroneous sentence.

Id. at 861 (internal citations and punctuation removed).

Thus, Schreiber does not challenge the *procedure* used to impose his judgment and sentence (a judge using a preponderance standard *vs.* a jury using a beyond a reasonable doubt standard).

Instead, Schreiber's challenge is much more basic—whether he could be sentenced for committing, at least in part, a crime that was not legislatively authorized. *See, e.g., McInturf v. Horton,* 85 Wn.2d 704, 706, 538 P.2d 499 (1975). In *McInturf,* this Court stated that "[t]he power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative." *McInturf,* 85 Wn.2d at 706; *see also State v. Ritchie,* 126 Wn.2d 388, 394, 894 P.2d 1308 (1995); *State v. Ermert,* 94 Wn.2d 839, 847, 621 P.2d 121 (1980); *State v. Carothers,* 9 Wash. App. 691, 696, 514 P.2d 170 (1973) ("The specification of the *ways or modes* by which a given crime may be committed is a legislative function."), *aff'd,* 84 Wn.2d 256, 525 P.2d 731 (1974). *See also State v. Wissing,* 66 Wash. App. 745, 755, 833 P.2d 424 (noting that there exists no common law crime in Washington), *review denied,* 120 Wn.2d 1017, 844 P.2d 436 (1992).

The question then is: whether the aggravating factor of lack of

remorse constitutes an element of the crime for which Schreiber was convicted? The answer to that question is clearly: "yes." As a result of this answer, aggravating circumstances may serve as elements of a greater crime only if they are statutorily authorized.

Schreiber's answer is certainly informed by the holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington,* 542 U.S. 296 (2004), although it finds support from numerous other cases, both pre- and post-dating Schreiber's conviction and sentence.

The specific holdings of *Apprendi/Blakely* are about answering two questions: (1) what is a crime? and, (2) who convicts people of crimes? Most of the litigation following these two decisions has focused on the second question. This case obviously focuses on the first question.

"This case turns on the seemingly simple question of what constitutes a 'crime.'" *Apprendi*, 530 U.S. at 499 (2000) (Thomas, J., concurring). A second sentence in Justice Thomas's *Apprendi* opinion also deserves highlighting:

> Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - of whatever sort, including the fact of a prior conviction - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

Id. at 501 (Thomas, J. concurring).

How the legislature labels a crime is not the relevant inquiry

(element *vs.* sentencing factor). Instead, the relevant inquiry is one not of form, but of effect. Thus, when the term "sentence enhancement" describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an "element" of a greater offense than the one covered by the jury's guilty verdict. *Apprendi,* 530 U.S. at 494 n. 19.

There is nothing new about this conclusion. Historically, a "crime" has been understood to include every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). An 1872 treatise by one of the leading authorities of the era in criminal law and procedure confirms the common-law understanding that the above cases demonstrate. The treatise condensed the traditional understanding regarding the indictment, and thus regarding the elements of a crime, to the following: "[T]he indictment must allege whatever is in law essential to the punishment sought to be inflicted." 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872) (hereinafter Bishop, Criminal Procedure). See *id.,* § 81, at 51 ("[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted"); *id.,* § 540, at 330 ("[T]he indictment must ... contain an averment of every particular thing which enters into the punishment"). Crimes, he explained, consist of those "acts to which the law affixes ... punishment," *id.,* § 80, at 51, or, stated differently, a crime consists of the whole of "the wrong upon which the punishment is based," *id.,* § 84, at 53.

In a later edition, Bishop similarly defined the elements of a crime as "that wrongful aggregation out of which the punishment proceeds." 1 J. Bishop, New Criminal Procedure § 84, p. 49 (4th ed. 1895).

Bishop grounded his definition in both a generalization from well-established common-law practice, 1 Bishop, Criminal Procedure §§ 81-84, at 51-53, and in the provisions of Federal and State Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for serious crimes, and trial by jury. With regard to the common law, he explained that his rule was "not made apparent to our understandings by a single case only, but by all the cases," *id.,* § 81, at 51, and was followed "in all cases, without one exception," *id.,* § 84, at 53.

Washington law is in accord. Washington law requires the State to allege in the information the crime which it seeks to establish. "This includes sentencing enhancements." *State v. Recuenco,* 163 Wn.2d 428, 435, 180 P.3d 1276 (2008), citing *State v. Crawford,* 159 Wash.2d 86, 94, 147 P.3d 1288 (2006) (stating that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information). *See also State v. Theroff,* 95 Wn.2d 385, 622 P.2d 1240 (1980).

Of course, Schreiber's argument focuses on an element of notice even more fundamental and basic: notice by the Legislature that certain conduct constitutes a crime or an element of a crime. The criminal system in the United States is concerned not only with guilt or innocence but also

with the degree of culpability in ensuring that the penalty is appropriate for the crime and that a greater stigma is not attached without the protections guaranteed by the Constitution.

Schreiber recognizes that this Court recently held otherwise in *State v. Hylton,* __ Wn.App.__, __ P.3d __ (2010). In *Hylton,* the defendant contended that because aggravating factors are the functional equivalent of elements of a crime, the addition of abuse of trust to the SRA's list of aggravating factors constitutes a substantive change to the law. Thus, according to Hylton, it could not be applied retroactively under RCW 10.01.040, which requires that crimes be prosecuted under the law in effect at the time they were committed.

This Court held "(a)lthough adding abuse of trust to the SRA constitutes some form of change, it does not affect Hylton's substantive rights." "First, the 2005 amendments did not change the legal consequences of any underlying conduct. The legislature specifically noted its intention to create a *new* criminal procedure, and to codify *existing* common law aggravating factors, without expanding or restricting the aggravating circumstances. Laws of 2005, ch. 68, § 1. RCW 9.94A.535 therefore did not create a new crime, increase the punishment for Hylton's crime, or deprive him of a defense." *Id.*

This Court's conclusion is incorrect.

In fact, the instant case is no different than the situation faced by the

Washington Supreme Court in *Hinton.* In *Hinton*, assault was a legislatively authorized crime. Where the victim died as a result of the assault, an increased penalty followed. The courts had repeatedly rejected challenges to that increased penalty in upholding the felony murder rule against repeated challenges. Finally, in response to *Andress* the Legislature authorized the crime of felony murder based on assault.

Hinton firmly and quickly rejected the State's attempt to apply the amendment to cases pre-dating the new law. "Finally, the 2003 legislative amendment to the statute, Laws of 2003, ch. 3, § 2, cannot be applied retroactively to petitioners' cases because such an application would violate the ex post facto clauses of the state and federal constitutions." "A law that imposes punishment for an act that was not punishable when committed or increases the quantum of punishment violates the *ex post facto* prohibition." "The amendment added assault to the category of felonies that can serve as predicate felonies for second degree felony murder. The amendment was clearly substantive, and it increased criminal liability for those committing an assault that unintentionally led to death."

The same is true in this case. Here, Schreiber was convicted and received an increased sentence, at least in part, for a judicially-created crime. The portion of the 2005 legislative amendment which specifies "aggravating" factors that had not previously been legislatively created was substantive, even if other portions of the law were procedural. Applying

that law to Schreiber's case violates the constitutional guarantee against *ex post facto* laws.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should:

1. serve the State with a copy of this PRP and request a timely response;

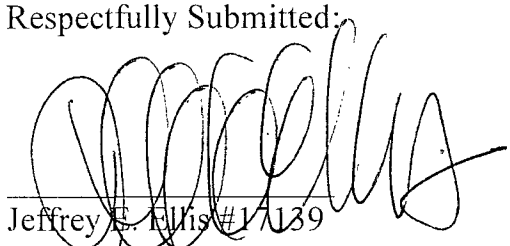
2. permit Schreiber to file a reply;

3. determine whether an evidentiary hearing is required;

4. reverse and remand for a new trial and/or a new sentencing hearing.

DATED this 7th day of April, 2010.

Respectfully Submitted:



Jeffrey E. Ellis #17139
Attorney for Mr. Schreiber

Law Office of Alsept & Ellis, LLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)
JeffreyErwinEllis@gmail.com

APPENDIX A ~
DECLARATIONS AND SUPPORTING DOCUMENTS

DECLARATION OF ROBIN SCHREIBER

I, Robin Schreiber, declare:

1. I am over 18 years old and competent to make this declaration.

2. I am the Petitioner in this PRP.

3. I was not asked if I wished to waive my right to an open and public trial before jurors filled out a confidential questionnaire. I was told that no one other than the lawyers, the judge, and me could see that document.

4. During the start of jury selection (after we moved down to the judge's regular courtroom), the prospective jurors were brought to the court in three groups. When each of these three groups was brought into the court (before any had been excused), there was no room left in the courtroom for spectators—so they had to leave.

5. As jury selection progressed, one day right before lunch the judge told the lawyers to come into chambers to question a particular juror. I think the judge thought the juror would be excused. I was not present when the juror was questioned.

6. I also recall one time when Judge Harris had the bailiff go back to the jury room alone and "talk to her"—a juror who had apparently voiced a concern—and then the bailiff came out and said she would remain on the jury.

7. I was never asked by anyone whether I wished to waive my right to an open and public trial or to be present during trial. If I had been asked, I would likely not have agreed to waive these rights.

8. On several occasions, I saw the presiding juror sleeping during trial. She was clearly sleeping—her head would lower and she'd remain still with her eyes closed for minutes at a time. This happened on at least three occasions.

9. On several occasions, mostly after lunch, the judge fell asleep several times during trial. Like the juror, his head would drop down; his eyes would close; and he'd remain motionless for minutes at a time until he'd awaken and appear slightly startled.

I, Robin Schreiber, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

March 23, 2010
Date and Place

Robin Schreiber
Signature of Petitioner

Monroe Correctional Complex
PO Box 777
Monroe, Wash. 98272-0777

DECLARATION OF THOMAS PHELAN

I, Thomas Phelan, declare:

1. I am over 18 years old and competent to make this declaration.

2. I was the trial attorney for Mr. Schreiber.

3. Prior to the start of trial, a confidential questionnaire was prepared for use during jury selection. I do not recall who first raised the issue of using a confidential questionnaire—the court, the prosecutor, or myself. However, I do recall that the prosecution and I were asked to submit the proposed questionnaire to the Court for review.

4. The questionnaire was provided to all prospective jurors. The document itself indicated that it was private—that no members of the public would view it. There was never a time that I am aware of when the questionnaire was available for any member of the public to view.

5. I am unable at this time to recall whether the Court discussed its decision to use the questionnaire or the fact that the questionnaires were filed under seal with the lawyers. I do not recall that the court discussed its reasoning on this in the presence of Mr. Schreiber.

6. During jury selection, I recall the Court told the lawyers to question one particular juror in chambers. That potential juror was questioned privately, and then was excused. My recollection is that Mr. Schreiber was not present during the questioning of this potential juror. I did not object because the Court had already made it clear that he wanted only the lawyers to accompany him into his chambers.

7. Following the verdict, Gary Rice, my investigator, and I spoke with juror Tracy Deckelbaum.

8. Ms. Deckelbaum was the presiding juror.

9. During the course of our conversation with Juror Deckelbaum, we asked her questions about her understanding of the jury instructions relating to the firearm enhancement and what was her understanding of the requisite "nexus" between the firearm and the crime.

10. Juror Deckelbaum told us that she understood that the instructions did not require any connection between the gun and the crime in order for the

enhancement to apply. Instead, she understood the instructions to provide that as long as there was a gun present in Mr. Schreiber's vehicle the evidence required a "yes" answer to the special verdict.

11. Juror Deckelbaum further stated that neither she nor the other jurors deliberated on the issue of the connection between the gun and the murder because none of the jurors believed the instruction required that element of proof.

12. After we spoke to Juror Deckelbaum, I prepared an affidavit for her signature. That affidavit accurately recounted the conversation that Mr. Rice and I had with her. However, when it was mailed to her, it was returned because she had apparently moved.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my recollection.

4/7/10 Kennewick, Washington
Date and Place

Thomas Phelan

DECLARATION OF BRAZEL SCHREIBER

I, Brazel Schreiber, declare:

1. I am over 18 years old and competent to make this declaration.

2. I am Robin Schreiber's brother.

3. I attended most of my brother's trial. I was asked to remain outside during the testimony of several witnesses because the defense attorney was not sure if he was going to call me as a witness.

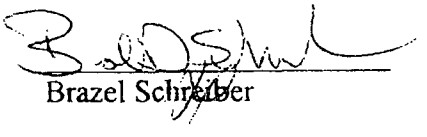
4. On several occasions, I saw the woman who was later identified as the presiding juror sleeping during trial. Her head would start to lower and bob down and then she'd remain still with her eyes clothes for several minutes at a time. When she'd awaken, it appeared as if she was slightly startled.

5. I would have to say she was out at least 3-4 times while I was present. As I recall it, she was asleep during some of the testimony of Officer Capellas and while they were testifying about the position of Robin's truck based on the two streams of brake fluid.

6. I also recall one time when Judge Harris had the bailiff go back to the jury room alone and "talk to her"—a juror who had apparently voiced a concern—and then the bailiff came out and said she would remain on the jury.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my recollection.

4/7/2010 Vancouver WA.
Date and Place


Brazel Schreiber

AMENDED INFORMATION

#5

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FILED
AUG 08 2005
JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. ROBIN TAYLOR SCHREIBER, Defendant.	**AMENDED INFORMATION** No. 04-1-01663-1 (CCSO 04-10738)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

AGGRAVATED MURDER IN THE FIRST DEGREE – 10.05.020 and 9A.32.030(1)(a)

That he, ROBIN TAYLOR SCHREIBER, in the County of Clark, State of Washington, on or about July 30, 2004, with a premeditated intent to cause the death of another person, did cause the death of such person, to wit: Clark County Sheriff's Office Sergeant Brad Crawford; and furthermore, the victim of said murder was a law enforcement officer who was performing his official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing; contrary to Revised Code of Washington 9A.32.030(1)(a) and 10.95.020(1).

And further, that the defendant did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.510, to-wit: a rifle.

And further, the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim. RCW 9.94A.535(3)(a).

And further, the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b).

And further, the offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense. RCW 9.94A.535(3)(v).

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And further, the defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system. RCW 9.94A.535(3)(x).

This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9A.94A.570).

As an alternative to the crime of Aggravated Murder in the first Degree, and/or as a lesser degree crime thereto:

MURDER IN THE SECOND DEGREE – 10.05.020 and 9A.32.050(1)(b)
That he, ROBIN TAYLOR SCHREIBER, in the County of Clark, State of Washington, on or about July 30, 2004, he committed or attempted to commit one or more of the following crimes:

Assault in the Second Degree, a felony crime, which is defined as:

> The knowingly and intentionally assault of a human being, with a deadly weapon, to-wit: he did knowingly and intentionally assault Clark County Sheriff's Sergeant Brad Crawford with motor vehicle, used as a deadly weapon,

and/or: Attempting to Elude Pursuing Police Vehicle, a felony crime, which is defined as:

> While being the driver of a motor vehicle, to willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice, emergency light, or siren by a uniformed police officer, to-wit: various Clark County Sheriff and Vancouver Police Officers whose vehicles were equipped with lights and sirens;

and/or: Malicious Mischief in the First Degree, a felony crime, which is defined as:

> To knowingly and maliciously cause physical damage, in an amount exceeding one thousand five hundred dollars ($1,500.00) to the property of another, to-wit: he knowingly and maliciously damaged a Sheriff's patrol car owned by the Clark County Sheriff's Office, causing over one thousand five hundred dollars ($1,500.00) damage to the patrol car;

and in the course of and in furtherance of said crime(s) or in immediate flight therefrom, the Defendant caused the death of a person other than one of the participants, to-wit: Clark County Sheriff's Office Sergeant Brad Crawford; contrary to Revised Code of Washington 9A.32.050(1)(b).

And further, that the defendant did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.510, to-wit: a rifle.

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And further, the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim. RCW 9.94A.535(3)(a).

And further, the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b).

And further, the offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense. RCW 9.94A.535(3)(v).

And further, the defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system. RCW 9.94A.535(3)(x).

This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9A.94A.570).

ARTHUR D. CURTIS
Prosecuting Attorney in and for
Clark County, Washington

Date: August 8, 2005

BY: _____
JAMES E. DAVID, WSBA #13754
Deputy Prosecuting Attorney

DEFENDANT: ROBIN TAYLOR SCHREIBER			
RACE: W	**SEX:** M	**DOB:** 8/24/1960	
DOL: SCHRERT408N4 WA		**SID:**	
HGT: 603	**WGT:** 270	**EYES:** HAZ	**HAIR:** BRO
WA DOC:		**FBI:**	
LAST KNOWN ADDRESS(ES):			
H - 11514 NE 128TH AVE, VANCOUVER WA 98682			

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JUDGMENT AND SENTENCE

PHELAN S5

FILED

JUL 27 2006

JoAnn McBride, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. ROBIN TAYLOR SCHREIBER, Defendant. SID: DOB: 8/24/1960	No. 04-1-01663-1 **FELONY JUDGMENT AND SENTENCE** (FJS) **PRISON – COMMUNITY PLACEMENT/COMMUNITY CUSTODY** **Clerk's action required;** ☐ **Paragraph 4.5 (SDOSA),** ☒ **4.15.2,** ☒ **5.3,** ☒ **5.6 and** ☐ **5.8**

I. HEARING 06 9 04810 4

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on June 28, 2006, by ☐ plea ☒ jury-verdict ☐ bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
01	MURDER IN THE SECOND DEGREE	9A.32.050(1)(a)	7/30/2004

(If the crime is a drug offense, include the type of drug in the second column.)
as charged in the Second Amended Information.

☐ Additional current offenses are attached in Appendix 2.1.

☐ The Court finds that the defendant is subject to sentencing under **RCW 9.94A.712.**

☒ A special verdict/finding for use of **firearm** was returned on Count(s) 1. RCW 9.94A.602, 533.

☐ A special verdict/finding for use of **deadly weapon** other than a firearm was returned on Count(s) _____. RCW 9.94A.602, .533.

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☐ A special verdict/finding of **sexual motivation** was returned on Count(s) _____. RCW 9.94A.835.

☐ A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

☐ This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130

☐ The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ The crimes charged in Count(s) _____ is/are **Domestic Violence** offense(s) as that term is defined in RCW 10.99.020:

☐ Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are Count(s) _____. RCW 9.94A.589

☐ Additional misdemeanor crime(s) pertaining to this cause number are contained in a separate Judgment and Sentence.

☐ Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____.

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
No Known Felony Convictions					

☐ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

☐ The court finds that the following prior convictions are one offense for purposes of determining the offender score RCW 9.94A.525:_____

☐ The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:_____

☐ The State has moved to dismiss count(s) _____.

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2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUS-NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
01	0	XIV	123 MONTHS to 220 MONTHS	60 MONTHS (F)	183 MONTHS to 280 MONTHS	LIFE $50000

* (F) Firearm, (D) other Deadly Weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present

☐ Additional current offense sentencing data is attached in Appendix 2.3.

2.4 ☒ EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence ☒ above ☐ within ☐ below the standard range for Count(s) 1.

☐ The defendant and the State stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the Sentencing Reform Act.

☒ Aggravating factors were: ☐ stipulated to by the defendant, ☐ admitted by the defendant in the Guilty Plea, ☐ found by the court after the defendant waived jury trial, ☒ found by jury by special interrogatory.

☐ The defendant waives his right to have a jury determine any issues regarding the imposition of an exceptional sentence upward. *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct 2348, 147 L. Ed 2d 435 (2000), Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).*

☐ Findings of fact and conclusions of law are attached in Appendix 2.4. ☒ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.750/753.

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____.

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are ☐ attached ☐ as follows:

_____.

2.7 If no formal written plea agreement exists, the agreement is as set forth in the Defendant's Statement on Plea of Guilty.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The Court DISMISSES Counts _____.

☐ The defendant is found NOT GUILTY of Counts .

3.3 There ☐ do ☐ do not exist substantial and compelling reasons justifying an exceptional sentence outside the presumptive sentencing range.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

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RTN/RJN	$ TBS	Restitution to be paid to: _____ ☐ Victim(s) and amounts to be set by separate court order		RCW 9.94A.750/ .753
PCV	$500.00	Victim Assessment		RCW 7.68.035
	$ _____	DV Penalty Assessment		RCW 10.99.080
CRC		Court Costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190		
	$ 110.00	Criminal filing fee	FRC	RCW 9.94A.505
	$ _____	Witness costs	WFR	RCW 10.01.160 and RCW 2.40.010
	$ _____	Sheriff Service Fees	SFR/SFS/SFW/WRF	RCW 10.01.160 and 36.18.040
	$ 250.00	Jury Demand Fee $ 250.00	JFR	RCW 10.01.160 and 10.46.190
	$ _____	Extradition costs	EXT	RCW 9.94A.505
	$ _____	Other Costs _____		RCW 9.94A.760
PUB	$_____ $ _____	Fees for court appointed attorney Trial per diem if applicable		RCW 9.94A.505/ .760/.030
WFR	$_____	Court appointed defense expert and other defense costs		RCW 9.94A.505, .760, 9.94A.030
FCM/MTH	$500.00	Fine		RCW 9A.20.021
CDF/LDI/FCD/ NTF/SAD/SDI	$_____	Drug fund contribution to be paid within two (2) years Fund # ☐ 1015 ☐ 1017 (TF)		RCW 9.94A.760
CLF	$100.00	Crime lab fee - ☐ Suspended due to Indigency		RCW 43.43.690
	$100.00	Felony DNA Collection fee (for crimes committed on or after July 1, 2002)		RCW 43.43.7541
RTN/RJN	$_____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum) To: _____ (List Law Enforcement Agency)		RCW 38.52.430
	$_____	Other Costs for: _____		RCW 9.94A.760

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☒ The above financial obligations do not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.750/753. A restitution hearing:
☒ shall be set by the prosecutor
☐ is scheduled for _____

☐ Restitution ordered above shall be joint and several with the co-defendants listed in the Information or identified below: _____.

☒ The Department of Corrections/Superior Court Clerk Collections Unit shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

☒ All payments shall be made in accordance with the policies of the Superior Court Clerk and on a schedule established by the Department of Corrections/Superior Court Clerk Collections Unit, commencing immediately, unless the court specifically sets forth the rate here:

Not less than $_____ per month commencing _____. RCW 9.94A.760.

☒ The defendant shall report as directed by the Superior Court Clerk and provide financial information as requested. RCW 9.94A.760(7)(b). The defendant shall report in person no later than the close of business on the next working day after the date of sentencing or release from custody. A map has been provided to the defendant showing the location of the Superior Court Clerk Collections Unit, 500 West 8th Street, Suite 50, Vancouver, Washington. The defendant must report any changes in address and phone numbers to the Collections Unit within 72 hours of moving.

☐ In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate of $_____. RCW 9.94A.760

☒ The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160. The defendant shall pay the cost of services to collect unpaid legal financial obligations. This is an annual fee which will be automatically renewed until financial obligations are completed. RCW 9.94A.780 and RCW 36.18.190

4.2 ☒ DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

☐ HIV TESTING. The defendant shall be tested and counseled for HIV as soon as possible and the defendant shall fully cooperate in the testing and counseling. RCW 70.24.340.

Failure to provide the DNA/HIV testing sample is a violation of this Judgment and Sentence and a warrant may be issued to compel compliance.

4.3 The defendant shall not have contact with Crawford Jade, Ly including, but not limited to, personal, verbal, telephonic, electronic, written or contact through a third party for life years (not to exceed the maximum statutory sentence).
☐ Supplemental Domestic Violence Protection Order or Antiharassment Order attached as Form 4.3.

4.4 **OTHER:** _____

_____

_____

_____

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4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections:

347 months on Count 02

Actual number of months of total confinement ordered is: 347
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

☐ The confinement time on Count(s) _____ contain a mandatory minimum term of _____.

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

_____

_____

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(b) CONFINEMENT. RCW 9.94A.712 (Sex Offenses only): The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count	minimum term	maximum term
02		

(c) Credit for 728 days time served prior to this date is given, said confinement being solely related to the crimes for which the defendant is being sentenced. RCW 9.94A.505

4.6 ☐ **COMMUNITY PLACEMENT** is ordered on Counts _____ for _____ months

☒ **COMMUNITY CUSTODY** is ordered on Counts 1 for a range from 24 to 48 months or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000.Community custody follows a term for a sex offense --RCW 9.94A.505. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant commited a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

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While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall be on community placement/community custody under the charge of the Department of Corrections and shall follow and comply with the instructions, rules and regulations promulgated by said Department for the conduct of the defendant during the period of community placement/community custody and any other conditions stated in this Judgment and Sentence. The defendant's conditions of Community Placement/Community Custody include the following:

☒ The defendant shall not consume any alcohol.

☐ Defendant shall have no contact with

_____.

☒ Defendant shall remain ☒ within ☒ outside of a specified geographical boundary, to wit: as set by the Department of Corrections.

☐ Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8)).

☒ The defendant shall participate in the following crime-related treatment or counseling services: Alcohol and/or substance abuse treatment.

☒ Defendant shall not violate any federal, state or local criminal laws, and shall not be in the company of any person known by him/her to be violating such laws.

☒ Defendant shall not commit any like offenses.

☒ Defendant shall notify his/her community corrections officer within forty-eight (48) hours of any arrest or citation.

☒ Defendant shall not initiate or permit communication or contact with persons known to him/her to be convicted felons, or presently on probation, community supervision/community custody or parole for any offense, juvenile or adult, except immediate family or as authorized by his/her community corrections officer for treatment purposes. Additionally, the defendant shall not initiate or permit communication or contact with the following persons:

_____

☐ Defendant shall not have any contact with other participants in the crime, either directly or indirectly.

☐ Defendant shall not initiate or permit communication or contact with persons known to him/her to be substance abusers.

☐ Defendant shall not possess, use or deliver drugs prohibited by the Uniform Controlled Substances Act, or any legend drugs, except by lawful prescription. The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.

☐ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held

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electronic scheduling and data storage devices.

☐ Defendant shall not frequent known drug activity areas or residences.

☒ Defendant shall not use or possess alcoholic beverages ☒ at all ☐ to excess.

The defendant ☒ will ☐ will not be required to take monitored antabuse per his/her community corrections officer's direction, at his/her own expense, as prescribed by a physician.

☒ Defendant shall not be in any place where alcoholic beverages are sold by the drink for consumption or are the primary sale item.

☒ Defendant shall undergo an evaluation for treatment for ☒ substance abuse ☐ mental health ☐ anger management treatment and fully comply with all recommended treatment.

☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a ☒ substance abuse ☐ mental health ☐ anger management treatment program as established by the community corrections officer and/or the treatment facility.

☐ Defendant shall participate in a **domestic violence perpetrator program** as approved under RCW 26.50.150 and fully comply with all recommended treatment. RCW 9.94A.505 (11).

☐ Based upon the Pre-Sentence Report, the court finds reasonable grounds to exist to believe the defendant is a mentally ill person, and this condition was likely to have influenced the offense. Accordingly, the court orders the defendant to undergo a mental status evaluation and participate in outpatient mental health treatment. Further, the court may order additional evaluations at a later date, if deemed appropriate.

☒ Treatment shall be at the defendant's expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.

☒ Defendant shall submit to urine, breath or other screening whenever requested to do so by the treatment program staff and/or the community corrections officer.

☐ Defendant shall not associate with any persons known by him/her to be gang members or associated with gangs.

☐ Defendant shall not wear or display any clothing, apparel, insignia or emblems that he/she knows are associated with or represent gang affiliation or membership as determined by the community corrections officer.

☐ Defendant shall not possess any gang paraphernalia as determined by the community corrections officer.

☐ Defendant shall not use or display any names, nicknames or monikers that are associated with gangs.

☐ Defendant shall comply with a curfew, the hours of which are established by the community corrections officer.

☐ Defendant shall attend and successfully complete a shoplifting awareness educational program as directed by the community corrections officer.

☐ Defendant shall attend and successfully complete the Victim Awareness Educational Program as directed by the community corrections officer.

☐ Defendant shall not accept employment in the following field(s):

_____

☐ Defendant shall not possess burglary tools.

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☐ Defendant's privilege to operate a motor vehicle is suspended/revoked for a period of one year; two years if the defendant is being sentenced for a vehicular homicide.

☒ Defendant shall not operate a motor vehicle without a valid driver's license and proof of liability insurance in his/her possession.

☐ Defendant shall not possess a checkbook or checking account.

☐ Defendant shall not possess any type of access device or P.I.N. used to withdraw funds from an automated teller machine.

☒ Defendant shall submit to affirmative acts necessary to monitor compliance with the orders of the court as required by the Department of Corrections.

☒ Defendant shall not be eligible for a Certificate of Discharge until all financial obligations are paid in full and all conditions/requirements of sentence have been completed including no contact provisions.

☐ Defendant shall not enter into or frequent business establishments or areas that cater to minor children without being accompanied by a responsible adult. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, malls or any areas routinely used by minors as areas of play/recreation.

☐ Defendant shall not have any unsupervised contact with minors. Minors mean persons under the age of 18 years.

☐ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. "Cooperate with" means the offender shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.

☐ Defendant shall submit to periodic polygraph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.

☐ Defendant shall submit to periodic plethysmograph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.

☐ Defendant shall not possess or use any pornographic material, defined as any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult or child human genitals: provided however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition as defined in RCW 9.68.130(2).or any equipment of any kind used for sexual gratification and defendant shall not frequent establishments that provide such materials or equipment for view or sale.

☐ If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the community custody time is tolled during that time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections for supervision.

☒ Defendant shall sign necessary release of information documents as required by the Department of Corrections.

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☐ Defendant shall adhere to the following additional crime-related prohibitions or conditions of community placement/community custody:

_____

_____

_____

4.7 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limit to the defendant while under the supervision of the County Jail or Department of Corrections:

_____

4.8 The Bail or release conditions previously imposed are hereby exonerated and the clerk shall disburse it to the appropriate person(s).

4.9 This case shall not be placed on inactive or mail-in status until all financial obligations are paid in full.

4.10 When there is a reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections can conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purposes of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned and possessed by the defendant.

4.11 Other:

_____

_____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

5.2 **LENGTH OF SUPERVISION** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten (10) years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7606

5.4 **RESTITUTION HEARING.**

☐ Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable

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identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41. 047

Cross off if not applicable:

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in Chapter 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 3 business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 3 business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must send signed, written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation or attend school in another state, you must register a new address, fingerprints and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement when Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. (Effective September 1, 2006) If you attend, or plan to attend a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. If you are enrolled on September 1, 2006, you must notify the sheriff immediately. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays after losing your fixed residence you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day

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specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require you to list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550

7. Reporting Requirements for Persons Who Are Risk Level II or III: If you have a fixed residence and are designated as a risk level II or III, you must report in person every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the Superior Court to e relieved of the duty to report every 90 days.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within 5 days of the entry of the order. RCW 9A.44.130(7).

5.8 ☐ The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately punch the defendant's Washington Driver's license or permit to drive with a "C" as directed by the Department of Licensing pursuant to RCW 46.20.270.

5.9 If the defendant is or becomes subject to a court-ordered mental health or chemical dependency treatment, the defendant must notify the Department of Corrections and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 Persistent Offense Notice

☐ The crime(s) in count(s) _____ is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030 (28 & 32(a)), 9.94A.505

☐ The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030 (32)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

5.11 **OTHER:** _____

DONE in Open Court and in the presence of the defendant this date: July 27, 2006.

JUDGE OF THE SUPERIOR COURT

Print Name: Robert Harris

James E. David, WSBA #13754
Deputy Prosecuting Attorney

Thomas C. Phelan, WSBA #11373
Attorney for Defendant

ROBIN TAYLOR SCHREIBER
Defendant

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SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. ROBIN TAYLOR SCHREIBER, Defendant. SID: DOB: 8/24/1960	NO. 04-1-01663-1 **WARRANT OF COMMITMENT TO STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	MURDER IN THE SECOND DEGREE	9A.32.050(1)(a)	7/30/2004

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
01	MURDER IN THE SECOND DEGREE	347 months

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 728 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the ~~same~~.

HEREIN FAIL NOT.

WITNESS, Honorable Robert Harris

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 7/27/06

JOANNE McBRIDE, Clerk of the
Clark County Superior Court

By: Sharon Ferguson
Deputy

Seal of the Superior Court
STATE OF WASHINGTON
Of Clark County

CAUSE NUMBER of this case: 04-1-01663-1

VOTING RIGHTS STATEMENT: I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: Robin Schreiber.

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name:_____

I, JOANNE McBRIDE, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by:_____, Deputy Clerk

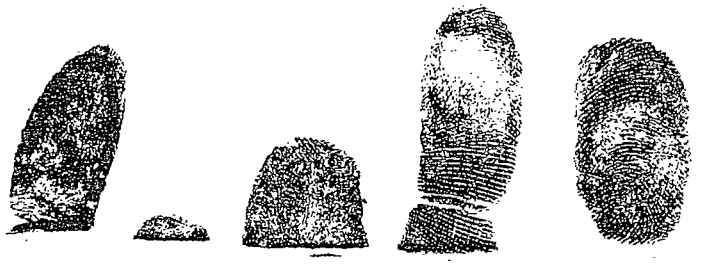
IDENTIFICATION OF DEFENDANT ROBIN TAYLOR SCHREIBER	
Alias name, SSN, DOB:	
SID No. (If no SID take fingerprint card for State Patrol)	Date of Birth 8/24/1960
Race: W	Sex: M
Driver License No. SCHRERT408N4	Driver License State: WA
FBI No.	Local ID No. (CFN): 133348
	Corrections No.
Other	

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: Sharon Harvey, Deputy Clerk.
Dated: 7/27/06

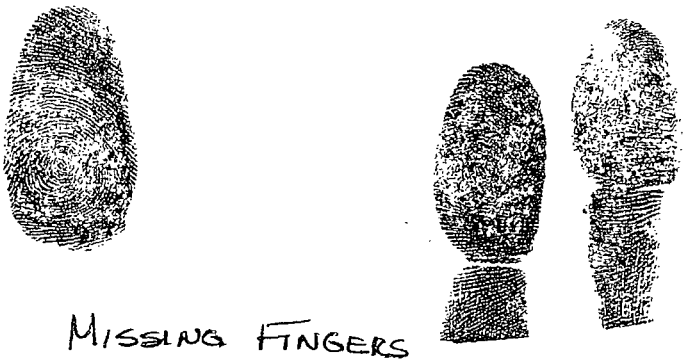
DEFENDANT'S SIGNATURE: Robin Schreiber

Seal of the Superior Court Of Clark County WASHINGTON

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously



MISSING FINGERS



MISSING FINGERS

JURY INSTRUCTIONS

40

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. ROBIN TAYLOR SCHREIBER, Defendant.	No. 04-1-01663-1

FILED
9:50 A.M.
JUN 27 2006
JoAnn McBride, Clerk, Clark Co.
Deputy Clerk

COURT'S INSTRUCTIONS TO THE JURY

Richard Harris
SUPERIOR COURT JUDGE

27 June 2006
DATE

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INSTRUCTION NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The sequence in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an Information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. During your deliberations, the testimony will not be repeated or reproduced for you. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party. You are the sole judges of the credibility of each

witness. You are the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections which they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit me to comment on the evidence in any way and I will not intentionally do so. By a comment on the evidence, I mean some expression or indication from me as to my opinion on the value of the evidence or the weight of it. If it appears to you that I have commented on the evidence, you are to disregard the comment entirely.

You have nothing whatever to do with any punishment that may

be imposed in case of violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 7

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 8

A person acts willfully when he or she acts knowingly.

INSTRUCTION NO. 9

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 10

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication must be considered by you in determining whether the defendant premeditated, or acted with intent, knowledge or recklessness.

INSTRUCTION NO. 11

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person.

INSTRUCTION NO. 12

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 30, 2004, the defendant caused the death of Brad Crawford.

(2) That the defendant acted with intent to cause the death of Brad Crawford.

(3) That the intent to cause the death was premeditated;

(4) That Brad Crawford died as a result of the defendant's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

Premeditation means thought-over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. Premeditation and intent are not synonymous. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 14

If you find the defendant guilty of murder in the first degree, you must then determine whether the following aggravating circumstances exist:

1) Brad Crawford was a law enforcement officer who was performing his official duties at the time of the act resulting in death and Brad Crawford was known or reasonably should have been known by the defendant to be such at the time of the killing.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

INSTRUCTION NO. 15

If, after full and careful deliberations on the charge of Murder in the First Degree, you are not satisfied beyond a reasonable doubt that the defendant is guilty, or if after full and careful consideration of the evidence you cannot agree on that crime, then you will consider whether the defendant is guilty of the lesser charge of Murder in the Second Degree.

If, after full and careful deliberations on the charge of Murder in the Second Degree, you are not satisfied beyond a reasonable doubt that the defendant is guilty, or if after full and careful consideration of the evidence you cannot agree on that crime, then you will consider the alternate charge of Felony Murder in the Second Degree.

If, after full and careful deliberations on the charge of Felony Murder in the Second Degree, you are not satisfied beyond a reasonable doubt that the defendant is guilty, or if after full and careful consideration of the evidence you cannot agree on that crime, then you will consider the charge of Manslaughter in the First Degree, the lesser included charge of Murder in the Second Degree.

If, after full and careful deliberations on the charge of Manslaughter in the First Degree, you are not satisfied beyond a reasonable doubt that the defendant is guilty, or if after full and careful consideration of the evidence you cannot agree on that crime, then you will consider the lesser included charge of Manslaughter in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of five or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

INSTRUCTION NO. 16

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person.

INSTRUCTION NO. 17

To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of July, 2004, defendant caused the death of Brad Crawford;

(2) That defendant acted with intent to cause the death of Brad Crawford;

(3) That Brad Crawford died as a result of defendant's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

A person commits the crime of Felony Murder in the Second Degree when he commits the crime(s) of Assault in the Second Degree or Malicious Mischief in the First Degree and in the course of and in furtherance of such crime(s) he causes the death of a person other than one of the participants.

INSTRUCTION NO. 19

To convict the defendant of the alternative crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of July, 2004, defendant caused the death of Brad Crawford;

(2) That defendant was committing Assault in the Second Degree with a deadly weapon or, Malicious Mischief in the First Degree;

(3) That defendant caused the death of Brad Crawford in the course of and in furtherance of one or more of these crimes;

(4) That Brad Crawford was not a participant in the crime; and

(5) That the acts occurred in the State of Washington.

To convict the defendant of Murder in the Second Degree based upon one of the crimes set forth in Paragraph 2 above, one or more of these crimes must be proven beyond a reasonable doubt, and you must unanimously agree as to which crime has been proven beyond a reasonable doubt. You will be asked in a special verdict form which, if any, of these crimes were found proven beyond a reasonable doubt.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, or unable to unanimous agree as to which crime, if any, in Paragraph 2 above was proven beyond a reasonable doubt, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

To convict the defendant of the crime of Murder in the Second Degree based upon Assault in the Second Degree, each of the following elements of the crime of Assault in the Second Degree must be proved beyond a reasonable doubt.

(1) That on or about July 30, 2004, defendant intended to assault Brad Crawford with a deadly weapon, to wit: a motor vehicle, with the intent that the motor vehicle be used in a manner capable of causing death or serious physical injury.

(2) That this act occurred in the State of Washington.

INSTRUCTION NO. 21

Deadly weapon means a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

INSTRUCTION NO. 22

To convict the defendant of the crime of felony Murder in the Second Degree based upon Malicious Mischief in the First Degree, each of the following elements of the crime of Malicious Mischief in the First Degree must be proved beyond a reasonable doubt:

(1) That on or about July 30, 2004, defendant caused physical damage to the property of another in an amount exceeding $1,500;

(2) That defendant acted knowingly and maliciously;

(3) That this act occurred in the State of Washington.

INSTRUCTION NO. 23

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

INSTRUCTION NO. 24

A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person.

INSTRUCTION NO. 25

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

INSTRUCTION NO. 24

To convict the defendant of the crime of Manslaughter in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of July, 2004, defendant caused the death of Brad Crawford;

(2) That defendant's conduct was reckless;

(3) That Brad Crawford died as a result of defendant's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

A person commits the crime of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person.

INSTRUCTION NO. 28

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

INSTRUCTION NO. 29

To convict the defendant of the crime of Manslaughter in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of July, 2004, defendant caused the death of Brad Crawford;

(2) That defendant's conduct was criminal negligence;

(3) That Brad Crawford died as a result of defendant's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 30

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in an orderly and reasonable manner, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. (For this purpose, use the form provided by the bailiff.) In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and five verdict forms, A, B, C, D and E, as well as special verdict forms. Some exhibits and visual aids may have been used in court but will not go with you to the jury room.

The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Murder in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A. If you find the defendant guilty in Verdict Form A, you will then need to answer the special Verdict Form Regarding Aggravating Circumstances as to First Degree Murder, according to the instructions accompanying that verdict form and according to the decision you reach.

If you find the defendant guilty on Verdict Form A, do not use Verdict Forms B C, D or E. If you find the defendant not guilty of the crime of Murder in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Murder in the Second Degree based upon intent as set forth in Instruction No. 17. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find the defendant guilty on Verdict Form B, do not use Verdict Forms C, D or E. If you find the defendant not guilty of the crime of Murder in the Second Degree based upon intent as set forth in Instruction No. 17, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the alternate charge Felony Murder in the Second Degree as set forth in Instruction No. 19. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form C the words "not guilty" or the word "guilty,"

according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C.

If you find the defendant guilty on Verdict Form C, do not use Verdict Forms D or E. If you find the defendant not guilty of the crime of Felony Murder in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree as set forth in Instruction No. 26. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form D the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form D.

If you find the defendant guilty on Verdict Form D, do not use Verdict Form E. If you find the defendant not guilty of the crime of Manslaughter in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the Second Degree as set forth in Instruction No. 29. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form E the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form E.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror will sign the verdict form or forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 30

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, or cannot unanimously agree, you must answer "no".

INSTRUCTION NO. 32

If you find the defendant guilty of premeditated murder in the first degree as defined in Instruction 17, you must then determine whether the following aggravating circumstance exists:

Brad Crawford was a law enforcement officer who was performing his official duties at the time of the act resulting in death and Brad Crawford was known or reasonably should have been known by the defendant to be such at the time of the killing

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt. If you unanimously agree that the above aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance. On the other hand, if you do not unanimously agree that the above aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "no" as to that circumstance.

Judges instruction

INSTRUCTION NO. 33

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime of Murder in the First Degree, or any lesser crime that you receive instructions regarding, including Murder in the Second Degree, Manslaughter in the First Degree or Manslaughter in the Second Degree.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 34

If you find the defendant guilty of any crime, you must then determine whether any of these additional facts exists:

(1) This offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, and that the defendant knew that the victim was a law enforcement officer.

The State has the burden of proving the existence of these additional facts beyond a reasonable doubt. In order for you to find the existence of an additional fact in this case, you must unanimously agree that the additional facts have been proved beyond a reasonable doubt.

SUPPLEMENTAL INSTRUCTION NO. 35

Certain exhibits have been admitted for illustrative or demonstrative purposes. These exhibits represent the opinion of the witness and can only be used for that purpose. These exhibits are Nos. 125, 141, 149, 243, 244, 245, 301, 302, 318, 319, 326 and 327.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	VERDICT FORM A
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, find the defendant, ROBIN TAYLOR SCHREIBER,

_____

(Write in not guilty or guilty)

of the crime of Murder in the First Degree as charged

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 180.01

INSTRUCTION NO. _____

If you find the defendant guilty of premeditated murder in the first degree as defined in Instruction ___, you must then determine whether the following aggravating circumstance exists:

Brad Crawford was a law enforcement officer who was performing his official duties at the time of the act resulting in death and Brad Crawford was known or reasonably should have been known by the defendant to be such at the time of the killing

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt. If you unanimously agree that the above aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance. On the other hand, if you do not unanimously agree that the above aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "no" as to that circumstance.

WPIC 30.03

INSTRUCTION NO. _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	SPECIAL VERDICT -
v.	)	AGGRAVATING
	)	CIRCUMSTANCES AS TO
ROBIN T. SCHREIBER,	)	FIRST DEGREE MURDER
	)	
Defendant.	)	

We, the jury, having found the defendant guilty of murder in the first degree as defined in Instruction ____, make the following answers to the question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

Brad Crawford was a law enforcement officer who was performing his official duties at the time of the act resulting in death and Brad Crawford was known or reasonably should have been known by the defendant to be such at the time of the killing

Answer:_____ (Yes or No)

_____

Presiding Juror

WPIC 30.04

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	VERDICT FORM B
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, having found the defendant not guilty of the crime of Murder in the First Degree as charged, or being unable to unanimously agree as to that charge, find the defendant, ROBIN TAYLOR SCHREIBER,

_____

(Write in not guilty or guilty)

of the crime of the lesser crime Murder in the Second Degree based upon intent as set forth in Instruction No. ___.

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 180.05

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	VERDICT FORM C
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, having found the defendant Robin Taylor Schreiber not guilty of the crime of Murder in the Second Degree based upon intent in Verdict form B and Instruction No. ____, or being unable to unanimously agree as to that charge, find the defendant, ROBIN TAYLOR SCHREIBER,

_____

(Write in not guilty or guilty)

of the lesser crime of Manslaughter in the First Degree.

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 180.06

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	VERDICT FORM D
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, having found the defendant Robin Taylor Schreiber not guilty of the crime of Manslaughter in the First Degree as set forth in Verdict Form C, or being unable to unanimously agree as to that charge, find the defendant, ROBIN TAYLOR SCHREIBER,

_____

(Write in not guilty or guilty)

of the lesser crime of Manslaughter in the Second Degree.

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 180.06

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	VERDICT FORM E
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, having found the defendant Robin Taylor Schreiber not guilty of the crime of Manslaughter in the Second Degree as set forth in Verdict Form D, or being unable to unanimously agree as to that charge, find the defendant, ROBIN TAYLOR SCHREIBER,

_____

(Write in not guilty or guilty)

of the alternative crime of Murder in the Second Degree based upon commission of a felony as set forth in Instructions No. ____.

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 180.06

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM A1
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Murder in the First Degree?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM B1
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Murder in the Second Degree based upon intent as set forth in Verdict form B?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM C1
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Manslaughter in the First Degree as set forth in Verdict form C?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM D1
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Manslaughter in the Second Degree as set forth in Verdict form D?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM E1
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Assault in the Second Degree as a basis for Murder in the Second Degree as set forth in Verdict form E?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM E2
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Malicious Mischief in the First Degree as a basis for Murder in the Second Degree as set forth in Verdict form E?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM E2
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Malicious Mischief in the First Degree as a basis for Murder in the Second Degree as set forth in Verdict form E?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM E3
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, return to a special verdict by answering as follows:

QUESTION: Was the defendant, Robin Taylor Schreiber, armed with a firearm at the time of the commission of the crime of Attempting to Elude A Police Vehicle as a basis for Murder in the Second Degree as set forth in Verdict form E?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM B1A
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, unanimously return to a special verdict by answering as follows:

QUESTION: Did the defendant's conduct during the commission of the crime of murder in the second degree based upon intent as set forth in verdict form B, manifest deliberate cruelty, towards Brad Crawford?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM C1A
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, unanimously return to a special verdict by answering as follows:

QUESTION: Did the defendant's conduct during the commission of the crime of Manslaughter in the First Degree as set forth in verdict form C, manifest deliberate cruelty, towards Brad Crawford?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM D1A
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, unanimously return to a special verdict by answering as follows:

QUESTION: Did the defendant's conduct during the commission of the crime of Manslaughter in the Second Degree as set forth in verdict form D, manifest deliberate cruelty, towards Brad Crawford?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM E1A
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, unanimously return to a special verdict by answering as follows:

QUESTION: Did the defendant's conduct during the commission of the crime of Assault in the Second Degree as a basis for Murder in the Second Degree as set forth in verdict form E, manifest deliberate cruelty, towards Brad Crawford?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM E1B
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, unanimously return to a special verdict by answering as follows:

QUESTION: Did the defendant's conduct during the commission of the crime of Malicious Mischief in the First Degree as a basis for Murder in the Second Degree as set forth in verdict form E, manifest deliberate cruelty, towards Brad Crawford?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	No. 04-1-01663-1
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT FORM E1C
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

We, the jury, unanimously return to a special verdict by answering as follows:

QUESTION: Did the defendant's conduct during the commission of the crime of Attempting to Elude a Police Vehicle as a basis for Murder in the Second Degree as set forth in verdict form E, manifest deliberate cruelty, towards Brad Crawford?

ANSWER: _____ Write "yes" or "no"]

DATED this _____ day of June, 2006.

_____

Presiding Juror

WPIC 190.02

SPECIAL VERDICT FORM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. ROBIN T. SCHREIBER, Defendant.	No. 04-1-01663-1 SPECIAL VERDICT FORM FOR VERDICT FORMS B, C, D or E

We, the jury, having found the defendant guilty of the crime of Murder in the Second Degree based upon intent or Felony Murder in the Second Degree based upon commission of a felony or Manslaughter in the First Degree or Manslaughter in the Second Degree as follows:

QUESTION: Did the defendant know that the victim of this offense was a law enforcement officer who was performing his or her official duties at the time of the offense?

ANSWER: Yes (write "yes" or "no")

Dated this 28th day of June, 2006.

Presiding Juror

161

12 - 0 pds

PUBLICALLY AVAILABLE VERSION OF
CONFIDENTIAL QUESTIONNAIRE

Kunze, Leeann

From: David, Jim (PA)
Sent: Thursday, May 25, 2006 7:15 PM
To: Harris, Robert; Kunze, Leeann; 'attorneyphelan@msn.com'
Subject: Jury questionnaire

FILED

JUN 05 2006

JoAnn McBride, Clerk, Clark Co

Judge,

Our view is that the questionnaire is far too long. A large portion of the general questions should be eliminated and the form reduced.

As far as specific questions, the following questions should be modified or deleted:

Question 29 delete the word "religious" ok

Question 41 add the words "NORML" and ACLU to the list of examples. ok

Delete question 82. We are not calling "agents of the federal or state government"

Delete question 83.

Delete heading "Case Specific Questions

Question 33 duplicates question 98. Delete either 33 or 98. delete 98

Delete question 103 no

Delete 104, or otherwise delete after the word accountable. yes

Delete 107 delete

Delete 109

Delete 110 no

Delete 114 – reword

Delete 117 delete

Delete 118 yes

143

B. Have you ever attended court before?

Yes_____ No _____

If yes, explain the circumstances, including reason you were in court:

C. Would you expect people who testify as experts witnesses about a subject to be fully versed in the facts of the matter about which they are testifying?

Yes_____ No _____

If not, would you consider this in evaluating their testimony?

Yes_____ No _____

Explain: _____

D. Do you have any ~~friends or acquaintances who have ever~~ been employed by a criminal defense attorney either as an investigator, staff member, or other position?

75

Yes_____ No _____

Explain: _____

Jim David

Delete 119 Yes

Delete 122 No

Delete 136

Delete 138
Delete 139 } No

Delete 140

Delete 141 OK leave in

Delete all of 142. delete

Delete 144 delete

Delete 147 OK

Delete 148 OK

Delete 154 OK

Delete 157 No

Delete 163 delete

Delete 164 as it is part of question 75. delete

Add the following questions:

A. 79 Have you ever been investigated, charged or convicted of a serious traffic matter, such as reckless driving or driving while intoxicated?

Yes_____ No _____

If yes, explain the date, type of offense, whether you were charged with the crime and the result:

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 04-1-01663-1
	)	
vs.	)	JUROR QUESTIONNAIRE
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	

A. USE BLUE PEN ONLY:

B. Please print your answers to the questions provided in this questionnaire. Please do not write on back of page.

C. Answer these questions by yourself. Do not discuss your answers with other jurors. We recognize some of the questions are of a personal nature. Nonetheless, it is important that you answer all questions candidly and truthfully.

D. The information you provide is confidential and for use by the Judge and the lawyers during jury selection. This questionnaire will be part of the sealed Court file and will not be available for public inspection or use.

E. If you do not understand a question, please put a question mark (?) in the space provided for the answer. The Judge and the attorneys will attempt to clarify the question for you during jury selection. If the space provided for your answers is not sufficient, please use the last page of this questionnaire to supplement your answers. If you supplement your answers, please refer to the question number that you are supplementing. If the question is not applicable to you, mark the space N/A.

F. YOU ARE UNDER OATH AND MUST ANSWER ALL QUESTIONS TRUTHFULLY.

F. YOU ARE UNDER OATH AND MUST ANSWER ALL QUESTIONS TRUTHFULLY.

_____
THE HONORABLE ROBERT L. HARRIS
Judge of the Superior Court
Juror#_____

SECTION I. FAMILY HISTORY

1. Your name:

_____
Last - First - Middle

2. Age:_____

3. Which of the following best describes your marital status?
(Single, Separated, Married, Living with Partner, Divorced, Widowed)

_____

A. Have you had any prior marriages? Yes_____ No_____
B. If Yes, how many?_____

4. Do you have children? Yes_____ No_____
A. If yes, what are their ages, sex, education, and occupation. Please identify below:

Age	Sex	Education	Occupation
_____	_____	_____	_____
_____	_____	_____	_____

B. If any of your children are married, please give their spouse/partner's education, including title, duties, and employer.

_____

_____

THE HONORABLE ROBERT L. HARRIS
Judge of the Superior Court
Juror#_____

SECTION I. FAMILY HISTORY

1. Your name:

_____
Last - First - Middle

2. Age:_____

3. Which of the following best describes your marital status?
(Single, Separated, Married, Living with Partner, Divorced, Widowed)

_____

A. Have you had any prior marriages? Yes_____
No_____

B. If Yes, how many?_____

4. Do you have children? Yes_____ No_____

A. If yes, what are their ages, sex, education, and occupation. Please identify below:

Age	Sex	Education	Occupation
_____	_____	_____	_____
_____	_____	_____	_____

B. If any of your children are married, please give their spouse/partner's education, including title, duties, and employer.

_____
_____

_____
_____

5. Have you, or any member of your immediate or extending family, or any friends served as a law enforcement officer? Yes_____
No_____

A. If yes, please identify that person, and the law enforcement agency for which that person is employed, and in what capacity, and your relationship to that person. Please identify below:

Name	Agency	Capacity	Relationship
_____	_____	_____	_____
_____	_____	_____	_____

SECTION II. OCCUPATIONAL INFORMATION

6. What is your present occupation?_____

7. What were your parents' occupations (mother, father, step-mother, step-father)?

_____
_____
_____

8. Which best describes your employment status (full-time employment outside the house, employed part-time outside the house, currently unemployed, homemaker, full-time student, retired)

_____

9. Do you supervise other people? Yes_____ No_____
If so, how many?_____

10. Do you have the authority to hire and fire employees?
Yes_____ No_____

11. Are you considering a career change? Yes_____ No_____

12. Who is your current employer? (If self employed in or outside of the home, please specify)
Employer_____
Address_____

13. What is the nature of your employment, including job title and general duties?

_____
_____

14. How long have you been employed by your current employer?

_____

15. Where have you worked in the past and what did you do? Please provide dates of employment for each previous employer.

A.)_____

B.)_____

C.)_____

D.)_____

16. What is your Spouse's or roommate's occupation, or their past occupations if divorced or widowed?

A.)_____

B.)_____

SECTION III. RESIDENCE INFORMATION

17. How long have you resided in Clark County and what area of Clark County do you currently reside in?

Length of Residence	Currently Reside (area)
_____	
_____	

18. Please indicate your place of birth.

_____

19. What is your current address?

_____

20. Do you rent or own your own home?_____

21. Do you live in an area near 114th Street and 124th Avenue in Brush Prairie, Washington? Yes_____ No_____

If so, please indicate how far._____

_____

22. Are you familiar with that location? Yes_____ No_____

If so, please explain your answer._____

_____

23. In what other communities have you lived during your life?

_____

_____

SECTION IV. MILITARY BACKGROUND

24. Were you in the military? Yes_____ No_____

25. If you answered yes to question 24, please answer the following:
    A. What branch of service?_____
    B. Dates of Active Duty service. From_____ To_____

26. Were you in anyway involved in the administration of military justice (i.e. law enforcement, courts martial, adverse administrative proceedings or Article 15 non-judicial punishments)?

Yes_____ No_____

A. If the answer is yes, in what way were you involved in the administration of military justice?_____

_____

_____

SECTION V. FORMAL EDUCATION BACKGROUND

27. What is the highest grade in school that you completed?

Grade _____ Year Completed _____

28. Which schools have you attended?

A. High School_____

_____

_____

B. Vocational/Trade School_____

_____

_____

C. College/University_____

_____

_____

_____

D. Other (Please Specify)_____

_____

_____

29. Please list any courses you have taken since completion of your formal education, including any self-improvement seminars, credit or non-credit; community college courses; ~~religious~~, professional, or other courses of any kind.

_____

_____

_____

_____

_____

_____

30. Are you or any close family member enrolled in or plan to attend any school in the near future?

Yes_____ No_____

A. If your answer is yes, please relate your current or future educational plans:

_____

_____

_____

_____

_____

_____

31. Do you or any close family member have any formal or other training in the law, or law enforcement?

Yes_____ No_____

A. If your answer is yes, please describe the nature and extent of such training:

_____

_____

_____

32. Do you or any close family member have any formal or other training in the

areas of psychology, psychiatry, or medicine? Yes_____
No_____

A. If your answer is yes, please describe the nature and extent of such training:

_____

_____

_____

33. Do you or any close family member have any formal or other training in the areas of alcohol abuse, or alcoholism? Yes_____
No_____

A. If your answer is yes, please describe the nature and extent of such training:

_____

_____

_____

34. What is the highest grade in school that your spouse, (former spouse if divorced or widowed), completed?

Grade_____ Year
Completed_____

35. What are your spouse/partner, or ex-spouse's education background?

_____

_____

36. Do you or any close family member have any formal or other training in the areas of accident reconstruction?
Yes_____ No_____

A. If your answer is yes, please describe the nature and extent of such

training.

_____
_

_____
_

_____
_

37. Do you or any close family member have any formal or other training in the areas of engineering?

Yes_____ No_____

A. If your answer is yes, please describe the nature and extent of such training.

_____
_

_____
_

_____
_

38. Do you or any close family member have any formal or other training in the areas of auto mechanics?

Yes_____ No_____

A. If your answer is yes, please describe the nature and extent of such training.

_____
_____

_____
_____

_____
_____

39. Do you or any close family member have any formal or other training in the areas of forensic science?

Yes_____ No_____

A. If your answer is yes, please describe the nature and extent of such training:

_____

_____

_____

_____

_____

_____ 40. Have you ever worked in a laboratory or medical research or testing facility?

Yes_____ No_____

A. If your answer is yes, please describe the nature and extent of such training._____

_____

_____

_____

_____

_____

SECTION VI. ORGANIZATIONAL - GROUP AFFILIATIONS

41. What organizations or groups of any kind have you at any point in time been a member of, or otherwise associated with? (For example: Alcoholics Anonymous (AA), Narcotics Anonymous (NA), NRA, NAACP, PTA, Sierra Club, MADD, YMCA, YWCA, Rotary Club, Chamber of Commerce, Church Groups) NORML, ACLU.

Current:_____

_____

Past:_____

If so, in what capacity were you affiliated with said organization? (i.e., donated, attended rallies, used bumper sticker)_____

42. Have you served as an officer in any organization?

Yes_____ No_____

If yes, please describe when, which organization and position held:

43. Do you belong to, associate with, or donate money to any groups that have as a goal the prevention of crime, enforcement of the law or any other group or organization that have a specific cause of crime reform? (For example, Neighborhood Watch, Mothers Against Drunk Drivers, Crime Victims Law and Order Committee)
Yes_____ No_____

If yes, please describe when, the nature of your affiliation, and which groups.

44. Would you describe yourself as a leader or a follower? Please explain.

_____

SECTION VII. PERSONAL ATTITUDES AND ACTIVITIES

45. Do you enjoy movies? Yes_____ No_____

A. What type?_____
B. What did you see last?_____
C. What was your opinion of it?_____

46. Do you enjoy reading? Yes_____ No_____

If yes, what authors and types of books do you tend to read?_____

_____

_____

47. What newspaper(s) to you read, and how often?_____

48. Do you watch television? Yes_____ No_____

If yes, what programs do you tend to watch?

_____

_____

49. What is your main source of news? If more than one, please number them in order of importance to you, (starting with 1 as most important).

Television _____
Radio _____
Newspaper _____
Magazine _____
Internet, World Wide Web _____
Family, Friends, and Workers _____

50. What magazines do you regularly read?_____

51. What newspapers do you subscribe to and/or regularly read?_____

52. How often do you read to newspaper or listen to the news on the radio or television?_____

53. In what kind of news are you most interested?_____

54. When you read books, do you prefer to read fiction or non-fiction?_____
Explain._____

55. What is your favorite television program?_____

56. Do you seek out positions of leadership? (Always, Often, Seldom, Never)

57. How often do you watch TV programs about real life or dramatized police activities, such as Law and Order, CSI, Cops, or the like?_____

58. What radio station do you generally listen to in your car or

home?_____

_____

59. Do you travel? If so, where have you traveled to recently?_____

_____

_____

60. What are your other leisure time interests and activities?_____

_____

_____

61. Have you ever written a letter to the editor? Yes_____ No_____
If so, what was the subject matter?_____

62. Do you attend church, temple or other religious or spiritual services regularly?
Yes_____ No_____

63. Do you have any religious, ethical, moral or philosophical views which make you to feel uncomfortable to sit in judgment as a juror on a criminal case?
Yes_____ No_____

If yes, what are they?_____

64. Do you consider yourself to be an expert on any subjects?
Yes_____ No_____

If yes, what subject?_____

_____

_____

65. Have you ever written any books or articles of any kind?
Yes_____ No_____

If yes, please describe._____

_____

_____

66. Would you describe yourself as a leader or a follower?_____
Please explain._____
_____
_____
_____
_____

67. Have you ever campaigned for any proposition or law concerned with law enforcement or reforming the criminal or civil justice system?
Yes_____ No_____

If yes, please explain._____
_____
_____

68. Name the three people you most admire._____
_____
_____

69. Name the three people you least admire._____
_____
_____

70. Over the past several years, what publicized cases have you followed or payed attention to?_____
_____
_____
_____
_____

A. Why did these cases interest you?_____
_____
_____
_____

B. Please describe the impressions these cases have left with you about the criminal justice system._____

_____

_____

_____

SECTION VIII. PREVIOUS JURY EXPERIENCE

71. Have you ever served as a juror on any of the following types of cases in State or Federal Court? (Include any prior experience as an alternate juror as well).

A. Criminal Case: Yes_____ No_____

If Yes,

1. When?_____

2. Where?_____

3. Was a verdict reached in all the cases that you participated in as a juror?

Yes_____ No_____

4. If a verdict was not reached, was it due to the inability of jurors to agree on a verdict or because of some other reason? Please explain.

_____

5. Did you serve as a jury foreperson? Yes_____ No_____

6. What were your impressions of the criminal justice system as a result of your prior jury experience?_____

_____

B. Civil Case Yes_____ No_____

If Yes,

1.

When?_____

2.

Where?_____

3. Was a verdict reached in all the cases that you participated in as a juror?

Yes_____ No_____

4. If a verdict was not reached, was it due to the inability of jurors to agree on a verdict or because of some other reason? Please explain.

_____

5. Did you serve as a jury foreperson? Yes_____ No_____

C. Grand Jury Proceeding? Yes_____ No_____

D. Coroner's Jury? Yes_____ No_____

72. Please explain any thoughts or feelings you have about judging the conduct or behavior of another person?_____

_____

_____

_____

73. Are you willing to follow the Judge's instructions on the law, regardless of what you personally believe the law is or ought to be?

Yes_____ No_____

74. Was there anything about your experience as a juror that would make you not want to serve again?

Yes_____ No_____

SECTION IX. PRIOR EXPERIENCES WITH LAW ENFORCEMENT PERSONNEL

75. Do you know anyone who is a Police Officer, Lawyer or anyone who works within the Court system (example: prosecutors, defense attorneys, Judges, court reporters, clerks, bailiffs, etc.)?
Yes_____ No_____
If yes, please list, the names of such individuals and describe the nature of your relationship to that person:

_____

_____

_____

_____

76. Have you, any of your family members or close personal friends ever had any business or personal relationships with any member or employee of a Law Enforcement Agency? This would include City, County or State Police, FBI Agents, U.S. Customs and Treasury Department Agents, or any other person who is involved in enforcing the law?
Yes_____ No_____
If yes, please list, the names of such individuals and describe the nature of your relationship to that person:

_____

SECTION X. EXPERIENCES WITH CRIMINAL JUSTICE SYSTEM

77. Have you or any of your family members or close personal friends ever been the victim of a crime of any kind, including assault, robbery, murder, or drunk driving?
Yes_____ No_____
If your answer is yes to the above question, please provide information regarding the following:
1. What kind of crime(s)?_____
2. Who was the

victim?_____

3. Was a report made to the authorities?_____

4. What was the final outcome?_____

78. Have you ever been an eyewitness to a crime as it was being committed? Yes_____ No_____

A. If your answer is yes to the above question, please give the experience. (If more than once, give details of each incident.)

B. Were you interviewed by the police? Yes_____ No_____

C. Did you testify in court? Yes_____ No_____

79. Have you or any close friends or relatives ever been convicted of a crime other than a minor traffic offense? Yes_____ No_____

If your answer is yes to the above question, please provide information regarding the following.

1. Person convicted?_____
2. What crime?_____
3. When did it occur?_____
4. What was the final outcome?_____
5. Did you testify in the case? Yes_____ No_____

80. Have you or one of your family members or close friends been accused of a criminal offense, or been reported to a law enforcement agency as a suspect in a criminal investigation? Yes_____ No_____

If yes, please explain:

_____

_____

_____

_____

_____

_____

81. Have you or one of your family members or close friends had any encounter or contact with a law enforcement officer or agency, not already described above, which you or the person contacted considered either very positive or very negative? Yes_____ No_____

If yes, explain_____

82. The State will call witnesses who are agents of the State Government. Does the fact that any of these individuals who are employed as State or County or City ~~Federal Agents~~ cause you to believe that solely because of their employment, they are more credible or more believable than other witnesses, and that their testimony is to be given greater weight than witnesses who are not Law Enforcement Officers?
Yes_____ No_____
If the answer is yes, please explain:_____
_____
_____

83. Do you feel that the testimony given by a Law Enforcement Officer will be more truthful and/or accurate than that of a civilian just because they are Law Enforcement Officers? Yes_____ No_____

SECTION XI. PUBLICITY

The following questions are not intended to suggest that you have, should have, or will hear anything about this case. However, if you have been exposed to information concerning the case prior to today, please answer the following questions carefully:

84. Do you know, or have you read, or heard anything from any source on the cases of State of Washington vs. Robin T. Schreiber?
Yes_____ No_____

A. If your answer to the above question is yes, please relate what information you have heard and what the source of that information was.
_____
_____
_____
_____

B. Based upon what you have read or heard about the case, what impressions do you have of Robin

Schreiber?_____
_____
_____

C. Have you discussed this case with anyone else, including conversations, letters, or by computer? Yes_____ No_____
If yes, please advise as to whom you had those conversations with and in what manner, and what date._____
_____
_____
_____
_____

D. Have you held an opinion about Robin Schreiber's involvement in this matter? Yes_____ No_____
If yes, please explain._____
_____
_____

E. Would you expect the defendant to testify at this trial?
Yes_____ No_____ Not Sure_____
Please explain._____
_____
_____

F. What was your reaction when you first realized you were picked to be a juror in this case?_____
_____
___

G. If you are selected as a juror in this case, will you be able to follow the court's instruction to not read any news coverage about the case?

Yes_____ No_____
If no, why not?_____

H. Will you advise the court if you do come into contact with news coverage about the case? Yes_____ No_____

85. Do you know Robin T. Schreiber? Yes_____ No_____
If yes, please describe:_____

86. Do you know Sgt. Brad Crawford? Yes_____ No_____
If yes, please describe:_____

87. Have you ever heard of Sgt. Brad Crawford? Yes_____
No_____
If yes, please specify how you heard of Sgt. Brad Crawford, and at what capacity you became acquainted with him._____
_____
_____

88. Are you now, or have you ever been a member of the New Heights Community Church? Yes_____ No_____
If so, please identify when you were a member of said church.
_____
_____

89. Do you know the family of Sgt. Brad Crawford? Yes_____
No_____
If so, please identify which member of the family, when you became acquainted with that person, and specify your relationship with that person.
_____
_____

90. Are you aware of the "Badge for Brad" campaign at the local Taco Bell outlet?

Yes_____ No_____

91. If yes, have you donated to this fund?
Yes_____ No_____

92. Are you aware of others who have donated to this fund?
Yes_____ No_____

93. Are you aware of the establishment of the Sgt. Brad Crawford Memorial Park?
Yes_____ No_____

94. If yes, please describe how you became aware of this.
_____

_____

SECTION XII. ~~CASE~~ SPECIFIC QUESTIONS Various ~~Facts~~ Topics

95. Have you ever volunteered in any capacity for any social service agency?
Yes_____ No_____

96. Have you ever worked as a volunteer, or in any professional capacity, in the area of alcohol abuse? Yes_____ No_____
If yes, please explain:_____

97. Have you read any books or received any specialized training in the area of alcohol abuse? Yes_____ No_____

(98) Do you have any close friends or family that have any specialized training, education or experience in the area of alcohol abuse?

Yes_____ No_____

99. Have you or any family members or close friends ever been counseled by a mental health professional, including social workers, psychologists or psychiatrists
Yes_____ No_____

If so, please explain:

_____

_____

_____

_____

100. Have you ever worked or volunteered at any job or activity which involved regularly coming in contact with alcoholics?
Yes_____ No_____

If so, please give
details:_____

101. Have you or any family members or close friends ever been diagnosed as or described as alcoholic?

Yes_____ No_____
If so, please
explain:_____

102. Have you or any family members or close friends ever been counseled by a counselor, mental health professional, social worker, psychologist, psychiatrist for alcoholism or alcohol abuse?

Yes_____ No_____
If so, please
explain:_____

_____

_____

103. Do you believe that a person who is an alcoholic is morally responsible for all choices that person makes? Yes_____ No_____
If so, please indicate
why?_____

_____

_____

104. Do you believe that a person who is accused of committing a crime while drunk should be held legally accountable ~~no matter what circumstances~~?

Yes_____ No_____
If so, please indicate
why?_____

_____

105. Do you have any scientific background? Yes_____
No_____
If so, please indicate that
background._____

106. Do you or any member of your immediate family or close friends possess any expertise or specialized education in engineering?

Yes_____ No_____
If so, please indicate the person with such expertise and your association with that person, including the depth of said person's engineering experience.

107 Do you believe that any person who operates a motor vehicle while under the influence of intoxicants is involved in an accident where a death result should in all circumstances be convicted of murder? Yes_____
No_____
If so, please explain your
answer._____

108. Are you familiar with this accident that occurred at 114th Street and 124th Avenue?
Yes_____ No_____
If yes, please
explain._____

109. Do you believe that law enforcement officers have better powers of observation than other people? Yes_____ No_____
If so, please explain your
answer._____

_____

110. Do you believe that law enforcement officers are incapable of making mistakes?
Yes_____ No_____

111. Have you ever witnessed a traffic accident? Yes_____
No_____
If so, please indicate the date, and your observations._____
_____
_____

112. Have you ever been in a traffic accident? Yes_____
No_____
If so, please indicate the date, and the describe the circumstances of the accident.
_____
_____

113. Have you, or any member of your family, or any close friends been involved in a collision with a party who has been using alcohol prior to the collision?
Yes_____ No_____
If so, please describe the circumstances of your answer._____
_____
_____

How do you compare the

114. ~~Are you the type of person that will always believe the~~ testimony of a witness, as opposed to physical evidence? ~~Yes~~_____
~~No~~_____
Please explain your answer._____
_____
_____

115. Do you or anyone in your family own a diesel pickup truck?
Yes_____ No_____
If so, please indicate who and what type of truck._____

116. Have you ever driven a diesel pickup truck? Yes_____
No_____

If so, please indicate when and what type of truck._____

117 Have you ever heard a diesel pickup truck? Yes_____ No_____
If so, please explain your answer._____

118 If the circumstances warranted it, would you have any problem assigning blame to police officers if you were shown that the police may have mishandled a certain situation?
Yes_____ No_____
Please explain your answer._____
_____
_____

119 If the circumstances warranted it, would you have any problem assigning blame to police officers if you were shown that police failed to act in a professional manner?
Yes_____ No_____
Please explain your answer._____
_____
_____

120. Have you read any newspaper articles or seen any media stories concerning this case? Yes_____ No_____
If so, please describe, including the date, source of information, and what you recall about that story._____
_____
_____

121. Do you believe alcoholism is a disease? Yes_____ No_____
Please explain your answer._____

122. Are you concerned about how you might be viewed by members of your family or the community if you were to enter a vote for not guilty in a case involving a police officer's death? Yes_____ No_____
Please explain your answer._____

123. Have you ever attempted suicide? Yes_____ No_____

124. Do you know anyone who has attempted suicide? Yes_____
No_____
If so, please explain your
answer_____

125. Have you ever received any treatment for alcohol addiction or alcohol abuse?
Yes_____ No_____

126. Have you seen any TV shows, read articles or other publications about alcoholism?
Yes_____ No_____
If yes, please describe the source of your information and your reaction or feelings?_____
_____
_____
_____

127. Do you have any feelings about alcohol that you believe would interfere with you ability to be fair and impartial in this trial?
Yes_____ No_____
If yes, please describe:
_____
_____
_____

128. Do you or anyone in your family have any special training or experience with regard to driving? Yes_____ No_____
If yes, please
explain._____
_____
_____

129. What are your opinions, if any, about
Prosecutors?_____
_____
_____

130. What are your opinions, if any, about criminal defense lawyers?_____

_____
_____

131. Do you have any strong feelings about the criminal justice system?
Yes_____ No_____
Please
explain._____
_
_____
_____
_____
_____

132. Would your attitude about the criminal justice system influence you to favor the Prosecution or the defense before hearing the evidence?
Yes_____ No_____
If yes, please
explain._____
_____
_____

133. Do you or any member of your family or close friends own guns?
Yes_____ No_____
If yes, please
explain._____
_____
_____

134. Do you believe that merely because a person may be in possession of a weapon means that that person intends to commit a crime?
Yes_____ No_____
Please
explain._____
_
_____
_____

135. What is the purpose that you, your friend, or family member, owns a gun?
_____
_____
_____
_____

136. Do you have any strong feelings about gun ownership?
Yes_____ No_____
Why?_____
_____
_____

137. Do you belong to any organization that is involved with advocacy for or against firearm ownership? Yes_____ No_____
If yes, what
organization?_____

138. Do you believe that simply because someone possesses a gun that he or she is probably a dangerous or violent person? Yes_____
No_____
Please
explain._____
_
_____
_____

139. The court will instruct the jury that in a criminal case the burden of proof remains with the prosecution. In order for the jury to return a verdict of guilty, the prosecution must prove beyond a reasonable doubt that a defendant is guilty. A person charged with a crime has absolutely no burden to prove that he or she is not guilty. Would you find it hard to accept and apply this rule?
Yes_____ No_____
Please
explain._____
_
_____
_____

140. What is your feeling about the rule of law that presumes a defendant in a criminal case to be innocent unless and until the government produces evidence in court which establishes guilt beyond a reasonable doubt?_____
_____
_____
_____
_____
_____
_____

Keep in

141. If you came to the conclusion that the prosecution had not proven the guilt of the defendant beyond a reasonable doubt, and you found that most of the jurors believed that the defendant was guilty, would you change your mind only because you were in the minority?

Yes_____ No_____

Please explain._____

_____

_____

_____

_____

_____

142. For each of the following statements, please rate how much you agree or disagree with each:

A. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence.

_____Agree strongly
_____Agree somewhat
_____Disagree somewhat
_____Disagree strongly

_____Other:_____

_____

B. In general, persons convicted of serious crimes receive lenient sentences from the courts.

_____Agree strongly
_____Agree somewhat
_____Disagree somewhat
_____Disagree strongly

_____Other:_____

_____

C. It is better for society to let some guilty people go free than to risk convicting an innocent person.

_____Agree strongly
_____Agree somewhat
_____Disagree somewhat
_____Disagree strongly

_____Other:_____

_____

D. The criminal justice system is biased in favor of celebrities and other well known people.

_____Agree strongly
_____Agree somewhat
_____Disagree somewhat
_____Disagree strongly

_____Other:_____

_____

E. Regardless of what the law says, persons charged with serious crimes should be required to testify.

_____Agree strongly
_____Agree somewhat
_____Disagree somewhat
_____Disagree strongly

_____Other:_____

_____

F. The criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes.

_____Agree strongly
_____Agree somewhat
_____Disagree somewhat
_____Disagree strongly

_____Other:_____

_____

143. Both sides will present expert witnesses in this case. Expert witnesses are

presented to help the jury understand technical or scientific issues, which are not a part of everyday common experience. The jury will be told that they may accept the expert's opinion if they find it to be reasonable and may reject it if they find it unreasonable.

Would you be able to listen open-mindedly to such an expert witness?

Yes_____ No_____

If no, why not?_____

_____

_____

144. Would you automatically believe or disbelieve anything an expert said merely because the person claims to be an expert?

Yes_____ No_____

Please explain._____

_____

_____

_____

_____

145. Would you be able to accept the expert's opinion if it seemed reasonable to you?

Yes_____ No_____

If no, why not?_____

_____

_____

_____

_____

146. Would you be able to disregard the expert's opinion, if it seemed unreasonable?

Yes_____ No_____

Please

explain._____
_
_____
_____
_____
_____

147. Do you believe that anyone who gets behind the wheel of an automobile, after having been drinking, and causes the death of another person must, because they drove the car, have intended to kill the person?
Yes_____ No_____

148. Do you believe the following to be true: Anyone who drinks and drives and kills someone is no different than someone who deliberately, or in cold blood, kills someone with a loaded firearm?
Yes_____ No_____
Please
explain._____
_
_____
_____
_____
_____

149. Do you have any objections to the jury system? Yes_____
No_____

150. Are you opposed to trial by jury? Yes_____ No_____

151. What attitudes do you feel are most important in serving as a juror in a criminal
case?_____
_____
_____
_____
_____

152. Do you want to serve as a juror in this case? Yes_____
No_____
Why?_____
_____
_____

153. Please mention anything not previously asked which you believe may affect your ability to be a juror in this case, or which may affect your participation as a juror on this trial._____

154. Jurors are permitted to discuss the case only during deliberations. Will you discuss this case with other jurors before deliberation?
Yes_____ No_____

155. Will you tell other jurors your views and listen to theirs?
Yes_____ No_____

156. Is there anything not on the questionnaire that you feel we should know about you?
Yes_____ No_____
Please explain._____

157. There are matters I would like to discuss outside the presence of other jurors.
Yes_____ No_____
If yes, please list question number or list them here._____

SECTION XIII. MEDICAL OR SCIENTIFIC TRAINING

158. Are you, or any of your immediate family members, relatives, or close friends, working in or associated with the medical field. (Included in this question is physicians, pathologists, nurse, or any other form of health practitioner.)
Yes_____ No_____

A. If your answer is yes to the above question, please describe your association with or particular training in this field.
_____
_____
_____

159. Do you have or have you had or have any members of your immediate family, relatives, or close friends had any specialized training in physical sciences such as medicine, biology, engineering, etc. Yes_____ No_____

A. If your answer is yes to the above question, please describe who possesses that particular qualification, their relationship to you, and the nature of any such specialized training.
_____
_____
_____

SECTION XIV. CONCLUDING QUESTIONS.

160. Do you have any physical conditions which would impair your ability to see or hear the evidence/testimony or would make it difficult so sit in one place for long periods of time? Yes_____ No_____
If you answer is yes, please explain:_____
_____
_____

161. Is there anything, not covered by this questionnaire, that you feel we should know about you? Yes_____ No_____
If so, please explain:_____
_____
_____

162. Are you registered to vote? Yes_____ No_____

163. What is your political party affiliation? (Optional)
_____

164. Do you now or have you ever known any Judge or court staff?
Yes_____ No_____
If so, please supply the person's name and describe the circumstances of that relationship._____
_____

165. Do you know any other person currently called for jury duty?

Yes_____ No_____

If yes, please describe the nature of that relationship._____
_____

166. A list of potential witnesses and Court personnel *has* been provided *as* an attachment to this questionnaire. Please review this list and circle the name of any person that you believe you are acquainted with or otherwise may know and describe your relationship to that person.

Additional Space for Continued Answers:

(If you could not sufficiently answer any question in the space provided, please use

this space to provide that information. Please indicate what page the answer is continued from and which question.)

_____

_____

_____

_____

_____

_____

_____

_____

SIGNATURE UNDER PENALTY OF PERJURY

The undersigned does hereby declare, under penalty of perjury, that the answers given herein are true and correct to the best of my knowledge and belief.

Signature:_____
Date:_____

City:_____

_____

Potential Witnesses

APPENDIX B ~
DOCUMENTARY EVIDENCE RELATED TO
FORMER WSP EMPLOYEE
ANN MARIE GORDON

IN THE DISTRICT COURT OF KING COUNTY FOR THE STATE OF WASHINGTON

EAST DIVISION, REDMOND COURTHOUSE

STATE OF WASHINGTON, Plaintiff, vs. AHMACH, SANAFIM, ET AL. Defendants	Case No. C00627921, ET AL. ORDER GRANTING DEFENDANTS' MOTION TO SUPPRESS

Each of the Defendants joined in this motion ask that this three judge panel of the King County District Court suppress the Defendants' breath test readings, arguing that the Washington State Toxicology Laboratory (WSTL) engaged in practices which were both fraudulent and scientifically unacceptable. The State, while agreeing that many of the activities of the WSTL were unacceptable, argues that suppression is not the appropriate remedy, both because none of the Defendants' tests were directly affected at any critical point and because the issues raised by the Defendants could be raised before each trier of fact and given their appropriate weight.

For the reasons stated in this Order, the breath tests in each of the Defendants' cases are suppressed.

Findings of Fact

Each of the Defendants herein were arrested for an alcohol related traffic offense, and each submitted to a test of his or her breath at the request of the arresting officer. These tests

were performed on the Datamaster or Datamaster CDM machines located throughout King County and Washington.

These instruments operate under the principal of comparing the unknown (the breath of the arrestee) to a known standard of alcohol to measure the amount of alcohol in the breath. There are multiple checks performed by the instrument to ascertain the accuracy of the result. One of the checks is the external standard, which measures the headspace alcohol vapor content of an external simulator solution (field solution). This solution is a mixture of ethanol and water in a known quantity prepared by the WSTL.

These instruments are periodically checked, calibrated and maintained by the Washington State Patrol Breath Test Section (breath test section). For this purpose they also use solutions of ethanol and water prepared to known standards by the WSTL (QAP solutions).

The procedure for preparation of QAP and field simulator solutions is set forth in protocols created and/or promulgated by the State Toxicologist, Dr. Barry Logan. An analyst mixes the solutions according to the protocol, and then each of 16 analysts test the solutions by preparing vials of the mixture and submitting them to headspace gas chromatography along with control vials and blank vials. The results are recorded for each analyst, and ultimately published to the web for access by the public. The analysts then "certify" that they have performed the tests, and that the results as published are correct. These certifications are intended to be used in court in lieu of live testimony by the toxicologists.

This three judge panel has found many irregularities in the preparation, use and documentation of these solutions and tests, as set forth below:

False Certifications

1. Ann Marie Gordon (AMG) became lab manager at WSTL by appointment of Dr. Logan.
2. AMG informed Dr. Logan that her predecessor as lab manager had engaged in a practice of having other toxicologists prepare and test simulator solutions for him and yet certify that he had prepared and tested the simulator solutions.
3. AMG told Dr. Logan that she did not approve of this procedure and was then also informed by Dr. Logan that it was not acceptable for a toxicologist to engage in this practice.
4. Nonetheless, AMG did engage in this practice beginning in 2003. Ed Formoso was a lab supervisor; he prepared and tested simulator solutions for AMG from 2003 to 2007. This involved 56 simulator solution tests.
5. Each test was accompanied by a CrRLJ 6.13 certification that AMG had performed the test and that the test was accurate and correct.
6. Melissa Pemberton was the quality control manager at the WSTL during a part of this time, and knew that AMG was not performing tests but was certifying them.
7. This deception was uncovered after two anonymous tips received by the Chief of the Washington State Patrol.
8. The first was received on March 15, 2007. Dr. Logan was directed by Assistant Chief Beckley to investigate this complaint.
9. Dr. Logan directed AMG and Formoso to investigate the complaint.
10. AMG and Formoso discussed the procedure and agreed that Formoso would no longer perform tests on behalf of AMG.

11. AMG informed Dr. Logan that she did not perform the tests of the solutions but that she signed the forms indicating that she did.

12. AMG and Formoso prepared a report stating that there was no problem with the certifications and that no solution had left the lab with an incorrect solution in 20 years.

13. Dr. Logan, AMG and Formoso knew, or should have known, that this report was incorrect and misleading, but took no steps to correct it or provide for another investigation.

14. Melissa Pemberton had run vials prepared for AMG by Formoso through the gas chromatograph along with her own samples, knowing that these were to be attributed to AMG, and that AMG would sign certificates alleging that she did the tests.

15. Dr. Logan was aware of this, by August of 2007.

16. DR. Logan and Pemberton both testified under oath that no one other than Formoso ever ran tests for AMG.

Defective and Erroneous Certification Procedures

17. The software used to perform calculations for simulator solution worksheets was defective from its inception in that it omitted the fourth data entry from the fourth toxicologist who performed the tests.

18. Beginning in August 2005 a change in the software resulted in a failure to include data from 4 of the 16 toxicologists performing tests in calculations to establish accuracy.

19. Lab protocols require the inclusion of all analysts' data in these calculations.

20. No one checked the software program to ascertain accuracy and compliance with protocols. There was no procedure or protocol propounded to check or verify software used by the WSTL.

21. Analysts were not trained or directed to check the calculations performed by the software.

22. Analysts regularly signed declarations which stated the mean concentration of alcohol in the solutions. These declarations were prepared by support staff, and were not checked for accuracy by the analysts before signing. In at least six instances these declarations were in error. At lest one analyst signed them a second time still reflecting the errors.

Software Failure, Human Error, Equipment Malfunction and Violation of Protocols

23. The software used for calculations to determine the acceptability of simulator solutions was developed by computer programmer(s) within the Washington State patrol and was not subject to rigorous testing and/or checking such that substantial errors resulted and significant data was deleted from calculations.

24. No procedure or protocol within the WSTL required this software to be validated for accuracy or fitness for purpose, and no Lab personnel conducted such testing at anytime, nor verified that the data produced was correct.

25. Errors based on software miscalculations existed within almost all field simulator solution certifications issued between August 2005 and August 2007. At least one QAP solution was similarly affected.

26. When analysts conducted gas chromatograph tests, the machine printed results automatically. These were maintained in the test files. Thereafter (sometimes weeks

after), worksheets were prepared by support personnel detailing the testing results for each toxicologist. Thereafter analysts signed the worksheets to acknowledge their correctness. These worksheets were not checked against the original chromatographs to determine if they were accurate before signing, and incorrect data was in fact inserted into some worksheets. These worksheets were posted to the web and relied upon in determining the accuracy and precision of the breath testing machines in the field.

27. Declarations by toxicologists for certification of the solutions are prepared by support personnel and then given to analysts to sign, sometimes weeks after the actual testing. These were not checked against chromatographs or worksheets to insure accuracy. There were at least 150 instances of similar non-software related errors committed by analysts and revealed in the record. These include:

a. Entering incorrect data into certification spreadsheets for use in calculations to determine mean solution values and compliance with protocols.

b. Entering incorrect test values for controls.

c. Entering data for the wrong solutions into certification spreadsheets.

d. Signing declarations indicating testing of the solution prior to the solution even being prepared.

e. Signing declarations indicating that a solution had been tested before the testing had taken place.

f. Incorrect dates for testing and/or signing of declarations.

28. The WSTL was equipped with several gas chromatograph machines for use by the analysts. A machine that malfunctioned was not repaired or maintained adequately

and this resulted in different operational and measurement characteristics and abnormal variations in readings. The machine remained on line for some time even though individual toxicologists knew that it was not functioning properly. Once repaired this abnormality disappeared.

Improper Evidentiary Procedures

29. In 2004 the Washington State Patrol conducted an internal audit of the WSTL. The report included the following conclusions:

a. The WSTL was noncompliant with policies and procedures in 8 major categories.

b. The simulator solution logbooks were not properly kept.

c. The required self audits were not performed.

d. AMO indicated that she did not have time to follow WSP policies and would not do so.

e. "WSP policies and required procedures appear to be of secondary concern to Lab personnel....Accurate recordkeeping and quarterly auditing as required by patrol Policies and CALEA standards is severely deficient."

30. In 2007 another internal audit was conducted by the Washington State Patrol. The report included the following conclusions:

a. "The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures."

b. "Mandatory audits are not being completed.... Non-standard evidence handling procedures and insufficient documentation to ensure the same...and failure to perform required audits jeopardizes operational performance as well as CALEA accreditation.

Inadequate and Erroneous Protocols and Training

31. The accuracy of breath alcohol measurements is determined by the use of simulator solutions. These must be accurately prepared and certified as such to gain the trust and confidence of the courts and public.

32. Accuracy of these solutions is assured by the adherence to proper protocols for their preparation and use.

33. Contrary to protocol requirements, toxicologists were trained to discard data generated by the tests if any single data entry lay outside the range for the mean value of the solution as dictated by the protocol. This tended to create a testing system that would not fail a solution as every value outside the range was discarded and only those that were within the accepted range were included in the calculations of accuracy.

34. Discarding of data is appropriate in some circumstances where identifiable reasons exist or where there is appropriate statistical justification (outliers). However, a decision to discard data must be governed by appropriate protocols and must be properly documented so that these decisions can be reviewed. Such a protocol was not promulgated until this legal proceeding was well underway, and documentation was not required or provided.

35. Several toxicologists discarded data without identifiable or statistical reasons for doing so. Inadequate or no documentation was provided, so that in those situations this Court cannot determine why data was discarded.

36. At least one toxicologist was not taught that testing of simulator solutions followed different procedures than testing of other materials, and conducted multiple tests, discarding the results of at least one test.

37. Protocols for solution preparation and machine testing were contradictory or inconsistent, resulting in field solutions being used for QAP testing in some cases.

Impact on Tests Conducted In the Field

38. Field solution #2018 was never properly certified due to errors committed by the analyst. This solution was used as the external standard in 2,018 tests.

39. Field solution #2019 was never properly certified due to similar errors committed by the same analyst. These two batch errors were likely caused when the analyst switched data. This solution was used as the basis for QAP's performed on at least 39 breath test machines. There were approximately 7,928 tests conducted on the affected machines.

40. QAP batch solution #06028 was certified after data was discarded improperly. QAP procedures were performed on 32 Datamaster machines using this solution. This had an impact on 3,445 tests.

41. Field solution #05008 was used as a QAP solution to test and calibrate the Datamaster. Though, perhaps, not a violation of protocol since the protocols were in conflict, Dr. Logan conceded that field solutions were never intended to be used for the QAP process. This solution was improperly certified by AMG. If the data from her tests were removed, the solution has a mean alcohol concentration of .1022, outside the acceptable range for QAP solutions. The tests conducted using machines tested and calibrated with this solution number 1,679.

42. Field solution batch #06003 was used as a QAP solution. This solution had a mean alcohol concentration of .1024, outside the range deemed acceptable for QAP solutions. Two machines were tested using this solution, affecting 392 individual tests.

43. Field solution #06048 was qualified using software which provided incorrect results. When correct figures are computed, it was determined that the solution would not have qualified as a QAP solution. At least one Datamaster QAP was performed with this solution, affecting 21 individual tests.

44. This same solution was also used as a field solution, but when proper calculations are made, it is apparent that it would have affected all tests conducted using this machine. However, the number of tests affected has not been determined.

45. QAP solution #06037 was certified using software that incorrectly calculated the equivalent vapor concentration. The machines calibrated using this solution affected 2,691 individual breath tests.

46. Field solution #06043 was tested by one analyst using a defective gas chromatograph. The test should have been repeated to determine accuracy. The number of individual test impacted by this has not been ascertained.

47. Not all (or possibly any) of the defective solutions noted above would have resulted in substantial changes in every test result. Some test results would be of greater importance than others if they are at or near the absolute standards for violations created by statutes, ie. .02, .04, .08, and .15. However, every test conducted with an improperly certified or defective solution is affected in some way.

Nondisclosure of Machine Bias

48. All measuring machines have some bias, and Datamaster breath test machines have bias which is identified in the QAP process.

49. This bias is not determinable without testing; sometimes creating readings lower than actual and sometimes higher.

50. The bias of any particular machine can be determined from the information created during the QAP process by applying mathematical formulas and calculations. This information is not readily available to the public, though it is published on the web. Due to the complexity of the calculations and formula involved, few in the legal community are aware of this bias. The Breath Test Section of the Washington State Patrol does, however, provide this information to attorneys and defendants when requested.

51. The machine bias information could be easily made available to the defendants, attorneys and public by the State Toxicologist.

Analysis

BAC Admissibility Post Jensen

The Washington legislature conveyed its "frustration with the inadequacy of previous attempts to curtail the incidence of (Driving Under the Influence) DUI" with the adoption of SHB 3055[1] in 2004. City of Fircrest v. Jensen, 158 Wn.2d 384, 388 (2006). Central to SHB

[1] In part, the legislature indicated its intent in the adoption of SHB 3055 as follows:
"The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.
To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays

3055 were amendments to RCW 46.61.506, by which the legislature sought to curtail pretrial motions seeking the suppression of breath tests in DUI cases. As amended, RCW 46.61.506 required that trial courts assume the 'truth of the prosecution's... evidence and all reasonable inferences from it in a light most favorable to the prosecution." RCW 46.61.506(4)(b). While the amendments would still allow defendants to challenge the reliability or accuracy of breath tests, those challenges would "not preclude the admissibility of the test once the prosecution ... has made a prima facie showing" of each of eight basic admissibility requirements set forth in the statute. RCW 46.61.506(4)(a). Ultimately then, SHB 3055 constituted a legislative attempt to eliminate the trial court's role as the gatekeeper[2] for a critical piece of evidence in DUI prosecutions.

Thus, when the Washington Supreme Court considered this issue in Jensen, supra, the court could have found that the legislation violated the inherent right of the judicial branch to control its own court procedures, i.e., a violation of the Separation of Powers doctrine. Instead, the Court determined that it could harmonize RCW 46.61.506, as amended, with the rules of evidence and give effect to both. Jensen, 158 Wn.2d at 399. The court held that, once the prosecution had met its prima facie burden under RCW 46.61.506(4), the breath test thereafter became "admissible," meaning that the court could still serve in its role as the gatekeeper under the applicable rules of evidence. Id. By analogy, the Jensen court referenced DNA testing:

caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result." Laws of 2004, ch. 68.

[2] A trial court is said to be the "gatekeeper" for the admissibility of evidence under both the Frye test (Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)) and under the standard articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993): State v. Copeland, 130 Wn.2d 244, 259-260 (1996). "In Daubert, the Supreme Court held that a trial judge should act as a "gatekeeper" to ensure that all scientific evidence admitted is both relevant and reliable." Reese v. Stroh, 74 Wn. App. 550, 559 (1994). The court also acts as the gatekeeper when it rules on motions to suppress scientific evidence under ER 403 or ER 702.

In the DNA analogy, DNA admissibility has been accepted under Frye[3]; however, challenges to the weight of the DNA evidence, including laboratory error, the size, quality, and randomness of Federal Bureau of Investigation (FBI) databases, and the methodology and practices of the FBI in declaring a DNA match, are subject to ER 702 admissibility as determined by the trial court.

Jensen, 158 Wn.2d at 397. Continuing this analogy to the cases herein, the trial court's determination that the prosecution had, prima facie, met the requirements of RCW 46.61.506(4), would be comparable to acceptance under Frye, meaning that the court would then move on to consideration of any rules of evidence that might be applicable.

ER 702 and Laboratory Evidence

A breath test reading is not admissible absent expert testimony, either in person or by affidavit as allowed by CrRLJ 6.13(c)[4]. Pursuant to ER 702, however, an expert may only testify "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." In a criminal prosecution, a post Frye analysis of the admissibility of expert testimony under ER 702 is a consequential activity with independent force and effect. "In this state ER 702 has a significant role to play in admissibility of scientific evidence aside from Frye." State v. Copeland, 130 Wn.2d 244, 259-260 (1996).

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[3] Frye requires that the court determine whether (1) the scientific theory has general acceptance in the scientific community, (2) the techniques and experiments that currently exist can produce reliable results and are generally accepted by the scientific community, and (3) the laboratory performed the accepted scientific techniques in the particular case. Frye v. United States, Supra.

[4] A breath test technician must testify that the BAC Verifier Datamaster or Datamaster CDM was tested, certified and working properly on the date of the test, and a state toxicologist must testify that the simulator solution was properly prepared and tested. Both would also have to testify that each activity was performed in conformance with the rules established by the Washington State Toxicologist. RCW 46.61.506(3); CrRLJ 6.13(c). The Defendants here have sought suppression of their breath tests based upon the failure of the WSTL to properly prepare, test and certify simulator solutions. The Defendants have not raised any issues relating to the Washington State Patrol Breath Test Section or Breath Test Technicians.

Under Jensen, therefore, after the prosecution has met its prima facie burden for the admission of a BAC reading, a trial court must engage in a meaningful review of the admissibility of the BAC evidence involving, under ER 702, a two part test. State v. Cauthron, 120 Wn.2d 879, 890 (1993). As in Copland, supra, the Cauthron court was concerned with the admissibility of DNA evidence:

> The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact. Part 2 of this standard should be applied by the trial court to determine if the particularities of the DNA typing in a given case warrant closer scrutiny. If there is a precise problem identified by the defense which would render the test unreliable, then the testimony might not meet the requirements of ER 702 because it would not be helpful to the trier of fact.

Cauthron, 120 Wn.2d at 890. In each of the following cases, the Supreme Court engaged in both a Frye analysis and an ER 702 review of challenged forensic laboratory conclusions. In each case discussed, the court began with the proposition that the "determination of whether expert testimony is admissible is within the discretion of the trial court. Unless there has been an abuse of discretion, this court will not disturb the trial court's decision." Cauthron, 120 Wn.2d at 890. In each case the trial court admitted the scientific evidence and none of the ER 702 challenges to the trial court decisions were overruled, both for the factual reasons noted for each below, and because in each case the court was upholding a discretionary ruling of the trial court.

- In State v. Cauthron, supra, the court noted that the defense had only presented "potential problems" with the DNA evidence. Moreover, the court noted that "the defense presented its own experts to rebut the State's conclusions. Dr. Ford and

Dr. Libby both testified that they found the autorads in this case inconclusive, and discussed their reasons at length. In addition, they each pointed out the possible pitfalls of DNA testing, such as degradation, staring, cross contamination, etc., and the lack of controls employed in the testing procedure. The jury was presented with a balanced picture of the DNA evidence[5]." Cauthron, 120 Wn.2d at 899.

- In State v. Kalakosky, 121 Wn.2d 525 (1993), the court quickly dealt with the two errors cited by the defense. (1) "The defense asserts that semen samples taken from the C.F. crime scene were spilled in 'close working proximity to samples of defendant's blood' The record does not support this". Kalakosky, 121 Wn.2d at 540. (2) "The defense also alleges that there was evidence of a mislabeled autoradiograph which compromised the reliability of the DNA testing. This also is unsupported by the record." Id.

- In Copeland, supra, the court considered the admissibility of lab results which had been challenged for a lack of external testing of lab procedures and for allegedly simplistic proficiency testing procedures. In dismissing these challenges, the court noted that "while a completely independent audit may be ideal, there was no evidence that the FBI procedures compromised the test results in this case." Copeland, 130 Wn.2d at 271. The court concluded that the "issues of laboratory error and lack of proficiency testing can be and were the subject of cross-

[5] The Cauthron court ultimately reversed the trial court, not for lab error, but because a critical underlying assumption for the admissibility of DNA testing was absent. "Testimony of a match in DNA samples, without the statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful to the trier of fact." Cauthron, 120 Wn.2d at 907.

examination and defense expert testimony at Copeland's trial. Id.; See also, State v. Cannon, 130 Wn.2d 313 (1996).

Thus, in each of the above cases dealing with potential lab errors and poor lab procedures, the errors and poor procedures were relatively insignificant. Moreover, the Supreme Court stressed the importance of a trial court's role in evaluating lab evidence under the mandates of ER 702.

In Kalakosky, while the court noted that alleged infirmities in the performance of a test will usually to go to the weight of the evidence, not its admissibility, it also stated that:

> If the testimony before the trial court shows that a given testing procedure was so flawed as to be unreliable then the results might be excluded because they are not "helpful to the trier of fact". The issue of human error in the forensic laboratory is analyzed under ER 702 and is not a part of the Frye test....

Kalakosky, 121 Wn.2d at 541. See also, Cannon, 130 Wn.2d at 325; and Copeland, 130 Wn.2d at 270. That this is still the standard in DUI cases post Jensen is reflected in Justice Madsen's concurrence in City of Seattle v. Ludviggen, 2007 Wash. LEXIS 953 (2007):

> When deviations from additional testing procedures or machine maintenance protocols are so serious as to render test results unreliable, a court has discretion to exclude them in accordance with the rules of evidence.

Ludviggen, at page 35

The State argues a violation of protocols by the WSTL could not provide any basis for

suppression of breath tests, citing State v. Mee Hui Kim, 134 Wn. App. 27 (2006). Kim, however, does not stand for the proposition that a breath or blood test may never be suppressed for a violation of WSTL protocols under ER 702. The defendant in Kim did not contend that the WSTL failed to comply with a protocol; rather the defendant in Kim argued that the State had failed to *show* compliance with a protocol:

> Specifically, Kim points to the State's failure to show that preparation of the volatile standards in the "Alcohol Standard Logbook" met the requirements in the Head Space GC Protocol.

Kim, 134 Wn. App. at 35-36. Ann Marie Gordon, testifying at the Kim motion hearing, stated that the protocol had been complied with and that the logbook was available at the lab for defense review. Upon these facts the trail court held that the State had shown compliance with the WAC and that the defense could (when, after the motion hearing they had been able to review the logbook) renew their motion to suppress. Kim, 134 Wn. App. at 36-37. Thus, trial courts are still able to weigh the failure of the WSTL to follow its own protocols in a motion to suppress under ER 702.

In each of the Defendants' cases herein, the defense cannot point to specific errors directly compromising the breath test results at critical BAC levels. For this reason the State argues that this court should decline to suppress the results of the breath tests and should instead admit the evidence at trial and allow the trier of fact to weigh each of the issues raised. While the State's position is generally preferable when disputes arise relating to the quality of scientific evidence, it is not always the last word on the subject. Indeed, if the court were always to admit

questionable evidence at trial, ER 702 would serve little purpose. Here we find, for the reasons documented in this court's findings of fact and more fully explained below, that the decision to suppress or admit tips considerably in favor of suppression.

Under the current statutory scheme, a charge of DUI is most commonly proven by two different means: proving that an individual drove a motor vehicle while under the influence of or affected by intoxicating liquor, or by proof that the person had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath[6]. RCW 46.61.502 (1). Proof of DUI via analysis of the persons breath is considered a per se violation, i.e., the state is not required to show that the defendant was affected by the alcohol, merely that the level of alcohol in the defendants breath was at or above 0.08. Thus, a crime which carries a potential sentence of one year in jail; carries a mandatory minimum of some amount of jail time, and which will result in the mandatory loss of the privilege to drive a motor vehicle, may be proved by evidence from an instrument alone.

The 0.08 BAC level is not the only critical level for breath alcohol which has been set by the legislature. The first critical level is 0.02, the level at which a person under the age of 21 may be convicted of Driving or Being in Physical Control of a Motor Vehicle After Consuming Alcohol. RCW 46.61.503. The next critical breath alcohol level is 0.04, the level at which a commercial driver will lose his or her commercial drivers license (CDL) for one year. RCW 46.25.090; RCW 46.25.120. Finally, in a DUI prosecution, in addition to the 0.08 breath alcohol level, the 0.15 level is also critical. A breath alcohol level of 0.15 or above carries greater mandatory minimum sentencing requirements. RCW 46.61.5055. Moreover, for breath tests

[6] The state may also prove the charge of DUI by proof that the defendant was under the combined influence of liquor and any drug or by proof that the defendant's blood alcohol concentration was 0.08 or higher. RCW 46.61.502 (1).

registering above 0.02, 0.04 and 0.08, an individual may lose his or her privilege to drive without the benefit of a prior hearing[7]. RCW 46.20.3101; RCW 46.25.120.

Thus, even errors in the range of 1 or 2% can have a profound effect on a breath test reading. Nonetheless, each expert witness who offered testimony[8] stated that there was not a process or a machine that would not insert some amount of inherent error in any result. That is also the case with the Datamaster and Datamaster CDM. In the process of breath test instrument calibration, the protocols indicate that breath test instrument is still functioning properly if it is accurate to within +/- 5%, and if the precision of the readings stand at +/- 3%[9]. Rod Gullberg testified that the lack of accuracy in a breath test machine is referred to as "bias." A breath test machine normally has a bias of 1-2%, with the smaller fraction of the machines registering a bias of 5% or less[10]. The breath test program is not, however, set up to account for any of the potential bias inherent in a breath test machine[11]. Thus, a process that already allows potential bias in each reading only underscores the importance of ensuring that the WSTL eliminates all other possible sources of error.

Throughout Washington State, over 40,000 breath tests are administered annually. In light of the importance of each one of these tests for the state and for individual defendants, it is vital that each aspect of the breath test program operate effectively. As stated in the findings, the WSTL prepares and tests both field simulator solutions and quality assurance procedure

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[7] In the case of a 0.04 reading, a CDL is lost. In each situation the defendant may request a hearing prior to revocation.

[8] The court heard testimony from the following expert witnesses: Rod Gullberg, Dr. Barry Logan, Dr. Ashley Emery and Dr. Nayak Polissar.

[9] The WAC defines accuracy and precision as follows: "accuracy" means the proximity of a measured value to a reference value; "precision" means the ability of a technique to perform a measurement in a reproducible manner. WAC 448-16-030 (1) & (10).

[10] The bias allowed in the protocols, however, does not include improper procedures or mistakes.

[11] For instance, readings are not adjusted at any of the critical levels to account for actual or for potential bias, nor are defendants informed of the potential bias before or during trial.

simulator solutions. These solutions serve as a critical check on breath test instruments to ensure that each will provide accurate and precise breath alcohol readings. The CrRLJ 6.13 certificates, or a toxicologist's in-court testimony, allow a breath test technician to "close the loop" and testify that the breath test reading was correct.

A Culture of Compromise

The Cauthron, Kalakosky and Copeland cases, discussed above, generally dealt with questions of lab mistakes and process errors. While many of our findings concern lab mistakes and process errors, the remaining findings indicate that the problems in the WSTL are much more pervasive.

Generally, our concerns regarding the WSTL fall into three general categories:

1. The failure to pursue the ethical standard which should reasonably be expected of an agency that operates as an integral part of the criminal justice system;
2. The failure to establish procedures to catch and correct human, and software and machine errors within the lab; and
3. The failure to pursue the rigorous scientific standards which should be reasonably expected of an agency that contributes a key component of critical evidence that may, almost standing alone, result in a criminal conviction.

Ethical Compromises

Ann Marie Gordon falsely signed CrRLJ 6.13 certifications under penalty of perjury indicating that she prepared and tested field simulator solutions and that the solutions were found to conform to the standards established by the State Toxicologist. This and other ethical compromises documented in the findings adopted in this order may at the same time be viewed

as both petty and alarming. The ethical compromises were petty because they were frustratingly unnecessary, and alarming because the WSTL exists primarily to provide accurate information to state trial courts[12]. It is, therefore, reasonable to expect that those employed in an office with such a direct link to courts, whose primary duty is the discovery of the truth, would fully understand the importance of truth in all of their activities. The State has argued that there isn't any evidence that Ann Marie Gordon ever actually testified in court that she had prepared and tested a simulator solution. Yet, CrRLJ 6.13 exists to allow the admission of simulator solutions (via affidavits) in the absence of direct court testimony by the toxicologist who prepared the solution. We do not know whether any false Ann Marie Gordon CrRLJ 6.13 certificates were ever used in court in lieu of live testimony, but considering the number of DUI trials, it is more than likely that some were.

There are several other factors that highlight the disturbing nature of this practice. This was a procedure which:

- Ann Marie Gordon herself had specifically recognized was inappropriate;
- violated the protocols of the WSTL;
- required that she not only state that she performed an activity which she did not perform but also that she sign an affidavit to that effect under penalty of perjury;

[12] The WSTL was created to provide forensic information to prosecuting attorneys as well as coroners and medical examiners. Prosecuting attorneys will, of course, request information from the WSTL in the hope that it will assist in the prosecution of anyone who may be guilty of committing a crime. In the case of breath alcohol testing, the link to trial courts is strong because the WSTL runs essentially independent of specific requests from individual prosecuting attorneys. The WSTL was specifically established by RCW 68.50.107:

> "There shall be established in conjunction with the chief of the Washington state patrol and under the authority of the state forensic investigations council a state toxicological laboratory under the direction of the state toxicologist whose duty it will be to perform all necessary toxicologic procedures requested by all coroners, medical examiners, and prosecuting attorneys."

- required the active participation of at least one other member of the WSTL (Edward Formoso) in the fraud (but we have also found that this pernicious fraud ultimately required the participation of toxicologist Melissa Pemberton and perhaps others)[13]; and
- set the ethical tone for the entire toxicology lab[14].

While such fraud can never be justified by necessity, it is, nonetheless, baffling to consider the risk the toxicology lab was willing to take for little, if any, gain. If Ann Marie Gordon never testified in court that she prepared and tested a simulator solution, and if this means that she, perhaps, never intended to so testify, why was she so ready to commit perjury by signing false certifications?

The State Toxicologist, Dr. Barry Logan, is ultimately responsible for the WSTL, and he bears a good deal of the responsibility for its shortcomings. He hired and supervised Ann Marie Gordon. Ms. Gordon testified that she continued to "test" solutions and sign the CrRLJ 6.13 certificates because she believed Dr. Logan wanted her to. Dr. Logan testified that he had been told in 2000 by Ms. Gordon that her predecessor in the WSTL had fraudulently signed CrRLJ 6.13 certificates when he was manager of the WSTL. Yet, not only did Dr. Logan fail to detect that this same fraudulent procedure was occurring from 2003 to 2007, but he also professed not to know that toxicologists even signed CrRLJ 6.13 certificates. Because of this ignorance, he testified that he did not understand the meaning of the first tip that came into the State Patrol. The tip indicated that "Simulator solutions are being falsified as far as the

[13] Although we cannot know with certainly whether this fraud was known to the other members of the WSTL, we believe that it is unlikely that anyone working in such a small office could have failed to see that one of their members was failing to test a solution and that, nonetheless, her name would appear on the paperwork they all had to sign indicating that they had each completed their testing.

[14] This conclusion is not meant to indicate that all members of the toxicology lab engaged in unethical practices. It is rather, a comment on the culture of the office itself. If the top of the chain of command engages in questionable practices, it should not surprise anyone to find that this poor behavior has infested the culture of the entire office. Again however, we caution anyone from making any specific conclusions about employees of the WSTL. Good people are quite capable of resisting poor behavior, even if a poor example is set at the top; and during the course of this motion we heard the testimony of many competent, dedicated and ethical people from the WSTL.

certification." Thereafter, in a situation screaming with irony, Dr. Logan assigned the perpetrator of the fraud, Ann Marie Gordon, the task of investigating the tip. To complete the circle, Ms. Gordon enlisted the assistance of lab supervisor Ed Formoso, her co-conspirator in the fraud, as her co-investigator. While they both ended their fraudulent practice at the time the first tip was received, their investigation also concluded that no fraud was occurring.

While it is not clear from the testimony of the various parties, just when Dr. Logan knew of the fraud, he should have known after the first tip. As previously stated, it is most likely that everyone in the WSTL was fully aware of the fraud, and if 16 toxicologists knew, why didn't Dr. Logan? When informed that the certifications were being falsified, why didn't he consider the possibility that his current lab manager was engaging in the same activity that had occurred a few years before? Why was Ann Marie Gordon assigned the task of investigating the tip? While these questions may never be answered, they cast a long shadow over Dr. Logan's ability to serve as the State Toxicologist.

Systemic Inaccuracy, Negligence and Violation of Scientific Principals

Dr. Nayak Polissar, an expert called by the State, testified that only superior methods will ensure accuracy, and that the accuracy and precision necessary for a particular laboratory task is dependent upon the particular use intended for the final product. As stated by the National Institute of Standards and Technology (NIST), "accuracy... is judged with respect to the use to be made of the data." NIST Special Publication 260-100, 2 (1993).

Data Transfer

When each of the 16 toxicologists tested simulator solutions, the data from their tests was recorded on documents known as chromatograms. The data was thereafter transferred to worksheets, a problematic step, unless the WSTL required a review to ensure that the data was

correctly transferred. The WSTL did not require that the data transfer be checked, and toxicologists signed certifications which were unverified and later found incorrect. Many errors in diverse areas were subsequently discovered.

Computer Software

The computer software used to enter and calculate simulator solution lab results on the worksheets was not created by an individual with the requisite knowledge and skill necessary to ensure that the data was correctly analyzed and recorded. Moreover, no one checked the software to determine if it was operating properly. Nor was this a mistake that one can charge to an individual employee. The WSTL itself never considered that it was necessary to check the software to ensure that it was fit for its purpose. The software contained errors which were not revealed until the WSTL came under close scrutiny because of the Ann Marie Gorton investigation.

Malfunctioning Gas Chromatograph

The WSTL suffered through a time period during which a gas chromatograph machine was malfunctioning. During this period of time, the gas chromatograph could, under certain circumstances, provide incorrect readings. The WSTL chose to ignore rather than address this issue for a considerable period of time.

Thousands of Tests Affected

Literally thousands of breath tests performed in recent years were affected through a multiplicity of errors in the toxicology lab. A very brief recitation of the errors include: the

improper rejection of data; erroneously switched data; the use of field simulator solutions to conduct quality assurance procedures; the use of software that improperly computed data and that improperly ignored the data of the last four of the toxicologists providing data for field simulator solutions; and, the use of simulator solutions that were outside of the allowable range.

Rod Gullberg effectually ran the breath test section for the Washington State Patrol for 25 years. Mr. Gullberg, who, along with Trooper Ken Denton, completed a lengthy review of the solution preparation worksheets from the WSTL, is also well acquainted with the WSTL and its processes. In his opinion, the problems in the WSTL are not the result of bad faith. Instead, Mr. Gullberg believes that the WSTL failures are the result of carelessness and complacency.

Motion to Suppress Granted

While we agree that trail courts should generally admit scientific evidence if it satisfies the requirements of Frye, we also agree that trial courts should thereafter engage in a meaningful ER 702 analysis, as we have here, when the circumstances require. Having done so, we conclude that, under ER 702, the work product of the WSTL is sufficiently compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the WSTL simulator solution work product would not be helpful to the trier of fact[15]. This litany of problems is indicative of a pervasive culture which has been allowed to exist in the WSTL. In this culture, the WSTL compromises the accuracy of the work product. Accuracy becomes secondary to the accomplishment of the work itself. Thus, because of this culture of the expedient, the WSTL has lost its effectiveness.

[15] Although many of the problems within the WSTL are of a general nature, our decision today concerns only the simulator solutions prepared and tested by the WSTL. Our decision does not, therefore, directly relate to any of the other work of the WSTL.

This conclusion is especially troubling because of the critical role the WSTL plays in combating the crime of DUI. The criminal justice system is appropriately assigned the task of discovering the truth. Simply stated, without the reliable evidence that a correctly functioning breath test instrument can provide, the discovery of the truth in DUI cases suffers; the innocent may be wrongly convicted, and the guilty may go free.

We wish to emphasize that our decision to suppress today results from the unique multiplicity of WSTL problems highlighted during this motion. Because the identified problems are multiple and diverse, and because the WSTL may find it difficult to prove, in any reasonable manner, that they have corrected each individual problem, we are not able to indicate with specificity, each correction required

Therefore, while we provide a list of our concerns below, we emphasize that the WSTL is not required to show that each has been corrected. Any one or two problems, standing alone, would not likely have resulted in suppression.

While the WSTL has attempted to modify its practices and procedures as a result of many of the problems noted in the findings herein, and improvements have been made,[16] additional effort is required.

Ethics

The WSTL has not been able to explain how Ann Marie Gordon and Ed Formoso (and perhaps the lab manager prior to Ann Marie Gordon), over a multiple year period, decided that it was acceptable to engage in a practice of falsely signing CrRLJ 6.13 certificates. We are not persuaded that this fraudulent activity should simply be laid at their feet. This apparently long

[16] Indeed, in reaction to a continuing series of discoveries, the State Toxicologist, Dr. Barry Logan amended protocols several times within a recent three month period.

standing ethical lapse is more likely a symptom of a greater problem; a WSTL culture that was tolerant of cut corners.

Errors

While the WSTL has made several policy changes to deal with many of the prolific errors within the WSTL, it has not been able to point to the reasons for what Rod Gullberg stated was a sense of complacency in the WSTL. The WSTL has, to date, simply corrected the systemic errors that have been called to its attention or were discovered as a result of a review of other problems called to its attention. The WSTL must establish procedures that, in the years ahead, ensure that their processes are double checked for accuracy[17].

Forensic Science

The State appropriately relies on the WSTL to produce (as is the case with the simulator solutions) and analyze evidence. The WSTL was not created, however, as an advocate or surrogate for the State. While the WSTL will always assist the State, it must never do so at the cost of scientific accuracy or truth.

In City of Seattle v. Clark-Munoz, 152 Wn.2d 39 (2004), the Supreme Court agreed with the statement that:

> If the citizens of the State of Washington are to have any confidence in the breath testing program, that program has to have some credence in the scientific community as a whole.

[17] Here we use the word accuracy in its colloquial, non-scientific sense. By the use of the word accuracy, we mean that the WSTL must establish a system which ensures reliability appropriate to the importance of the purpose of each specific task.

Clark-Monoz, 152 Wn.2d at 47. Although the Clark-Monoz holding has been brought into some question as a result of the ruling in Jensen, supra, the proposition that robust scientific standards are expected in the WSTL still remains. And while Rod Gullberg testified that, after the changes made in the WSTL in the fall of 2007, he now has more confidence in the WSTL, more work is required. In the summer of 2008 the WSTL plans to adopt the General Requirements for the Competence of Testing and Calibration Laboratories, ISO/IEC 17025:1999(E), promulgated by the International Organization for Standardization. These standards are neither required for a toxicology laboratory, nor are they a panacea for the past and current problems in the WSTL. Their adoption, however, is likely to move the WSTL a long way toward the type of reliable forensic science which should be expected of a state toxicology lab.

Conclusion

We hold that, under ER 702, the work product of the WSTL has been so compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the WSTL simulator solution work product would not be helpful to the trier of fact. The State, perhaps expecting the suppression of some of the work product of the WSTL, has asked this panel to be as specific as possible in our ruling. Specificity is made difficult, however, because of the nature of the problems identified. The State may, therefore, request that this panel reconvene at such time that the State believes it has sufficient evidence that the WSTL has adequately addressed the issues noted in this Order[18].

[18] The alternative, of course, is to seek the admission of breath test evidence before each individual judge who adopts this ruling and then, when the defendants raise the issue, argue case by case that the WSTL simulator solutions currently meet the requirements of ER 702.

Forensic Investigations Council Report on the Washington State Toxicology Laboratory and the Washington State Crime Laboratory
April 17, 2008

The Forensic Investigations Council (FIC) was created in 1995 by the Washington State Legislature to oversee Forensic Laboratory Services Bureau that is part of the Washington State Patrol. The Council is composed of twelve members representing county government, city legislative authority, private practice pathologists and the Chief of the Washington State Patrol.

In 2006 and 2007 a number of problems and allegations of problems arose regarding the work of a forensic scientist in the State Crime Laboratory and also employees of the State Toxicology Laboratory. Dr. Barry Logan, the Director of the Forensic Laboratory Services Bureau (FLSB) responded to these issues and a number of audits were conducted to evaluate the services provided by the FLSB and examine the procedures and polices that were in place. These matters were initially reported to the FIC by Dr. Logan and the progression of the audits was passed on to the Council. In addition, the Washington Association of Criminal Defense Lawyers (WACDL) and the American Civil Liberties Union (ACLU) both asked the FIC to investigate allegations relating to the FLSB in October and November of 2007.

The Washington State Crime Laboratories and the Washington State Toxicology Laboratory form the Forensic laboratory Services Bureau (FLSB) in the Washington State Patrol. The Director of the FLSB was Dr. Barry Logan, who reports to the Chief of the Washington State Patrol and the Forensic Investigations Council. The Crime Laboratory System consists of seven laboratories throughout the State and conducts forensic investigations on evidence secured by law enforcement in criminal cases. The Toxicology Laboratory system consists of one laboratory in the State and conducts testing as requested by County Coroners and medical examiners and law enforcement agencies and also runs the Breath Testing Program. The FLSB has 198 employees and eight laboratories.

Crime laboratory

The Crime Laboratory has a system of peer review for work done by the forensic scientists prior to the issuance of laboratory reports. There are also levels of supervision of these employees. During the ordinary course of peer and supervisory review of the work of Forensic Scientist Evan Thompson, deficiencies were discovered. Due to concerns he was placed on a work improvement program in April of 2006. During this review process an error was discovered on Mr. Thomson's work relating to bullet trajectory analysis. Due to concern raised about this type of work by Mr. Thompson, he was removed from bullet trajectory casework on October 2, 2006. As the review by Crime Laboratory supervisors took place, technical errors and violations of laboratory operating procedures were discovered, and Mr. Thompson was removed from all casework responsibilities on November 13, 2006. Mr. Thompson's case files were reviewed and irregularities were discovered, and then a focused casework review was undertaken of Mr. Thompson's work. During this process Mr. Thompson resigned from the State Crime Laboratory effective April 6, 2007.

In order to fully examine Mr. Thompson's work, Dr. Barry Logan contracted with two independent firearms examiners, Matthew Noedel, and Dwight Van Horn. They were initially directed to examine 13 cases that Mr. Thompson had completed. Other casework was also examined by the two examiners. Mr. Nodell reported that he discovered work that was poorly organized and poorly documented, but the conclusions did not appear to be wrong.

During the pendency of this review an independent Forensic Consultant, Larry Lorsbach of American Society of Crime Laboratory Directors/Laboratory Accreditation Board [ASCLAD/LAB] was retained by the Washington State Patrol to audit the firearms function of the Seattle, Spokane, and Tacoma Crime Laboratories. The audit findings related to documentation of findings and for explaining why definite conclusions could not be reached in some cases. These recommendations were reviewed and adopted by the FLSB. The discovery and actions taken relating to Mr. Thompson, and the audit that was conducted, showed that the firearms division of the Crime Laboratory was functioning properly and appropriate safeguards were in place to identify work that was not up to the

standards that the lab requires. Once work quality was questioned, the employee was taken off casework and his work was examined. The process worked well in this instance and peer review and quality control issues were well positioned to insure that if work product was not thorough and professional in nature, it would be observable and remedied.

Problems in the State Toxicology Laboratory

In order to understand the problems that occurred in this section of the FLSB, that became apparent in the month of July, 2007, it is important to review the annual audits as well as the special audits conducted by the Washington State Patrol. As part of normal procedure internal audits are conducted annually on the evidence system at the State Toxicology Laboratory. In addition, independent audits were undertaken after discovering problems with the certifications of simulator test solutions submitted by Lab Manager Ann Marie Gordon relating to the Breath Test Program. The Risk Management Division of the Washington State Patrol conducted an audit of the evidence system at the State Toxicology Laboratory that was completed on September 4, 2007. This audit traced prior audits that had been conducted on the evidence system since 2004.

Evidence Audit in 2004

In 2004 the audit revealed no evidence of theft, tampering, or misappropriation, but outlined a number of findings. One of the major concerns of this audit was the storage of blood tubes and breakage due to freezing of the tubes. The audit also made findings relating to documentation and the shortcomings of the lab in this area. There was no destruction authorization documentation, no recording of discovery requests and no retention schedule relating to records. Ms. Gordon, the lab manager indicated that she did not have the time to follow the Toxicology Lab's Standard Operating Procedure (SOP) Manual relating to documenting disclosure requests. She stated that she would not be able to do this in the future due a lack of staffing. The audit indicated that the Lab Manager expressed frustration with the level of workload that the lab personnel had to deal with while still complying with the paperwork requirements of the agency. There appeared to

be a shortage of personnel to accomplish the tasks the lab was directed to perform. The audit findings were responded to by both Ms. Gordon and Dr. Barry Logan.

Evidence Audit in 2005

Another evidence audit was conducted in 2005 by the Washington State Patrol. This audit specifically commended Ms. Gordon for the effort she had shown in responding to the prior audit concerns. There were no major findings in this audit.

Evidence Audit in 2006

Another evidence audit was conducted by the Washington State Patrol in 2006 and there were no findings for this audit.

Evidence Audit in 2007

Another evidence audit was completed by the Washington State Patrol in 2007 and there were no findings for this audit. The auditors commended Mr. Formosa for managing the sizeable inventory stored by the lab. Reponses from the staff during this audit showed that the recommendations from the prior audits had been implemented. In addition, staff had been added to assist in the evidence handling.[1]

Breath Testing Section

On March 15, 2007, the Washington State Patrol's anonymous tip line received a call which stated that the "Simulator solutions are being falsified as far as the certification." On March 23, 2007, Dr. Logan was given a copy of the message. He then asked Ann Marie Gordon, the Toxicology Lab Manager to investigate the message. Breath instruments used in the State of Washington are BAC DataMaster and BAC DataMaster CDM. These machines utilize a simulator solution during the initial phases of the breath test to determine whether the breath test machine is accurately measuring

[1] It was apparent from this progression of evidence audits that lack of staffing in the Toxicology Lab was one of the major reasons for problems maintaining the proper documentation of records that had been cited earlier.

breath alcohol content. The external simulator solutions are prepared by the Toxicology Laboratory analysts pursuant to protocols established the State Toxicologist. The process of preparing and testing the solutions is called "certification." No less than three analysts must certify the simulator solution prior to its certification. The practice of the Toxicology Lab was to have up to sixteen analysts certify the simulator solution, which allowed all to testify if necessary on court cases. This was believed to be less intrusive to the lab work processes, since more analysts were available for trial testimony.

Ms. Gordon and Mr. Formosa responded in writing to Dr. Logan's request for an investigation on April 11, 2007. They indicated that all data had been reviewed from January 2007, through March, 2007, and all was found to be accurate. Ms. Gordon later met with Dr. Logan and revealed that she had not been testing her simulator solutions and had delegated this to another analyst. Dr. Logan told her that as the manager she should not be testing the simulator solutions and asked her to cease doing this.

On July 9, 2007, the Washington State Patrol's anonymous tip line received a second call, which stated, "Ann Marie Gordon doesn't really certify all those simulator solutions. If you look in the file you'll find a grammetigram with her name on it, but if you also check over the years of where she really was on the days that those things were certified you'll find once in a while she was in DC or Alaska, or somewhere else. She had somebody else do it and then she'll sign the form that says, under penalty of perjury I analyzed this. If you don't think that's a big deal just think what Francisco Duarte would think of that." Dr. Logan met with Ms. Gordon after he received the second anonymous message and told her that an investigation would be begun on this matter. Ms. Gordon indicated that there was no need for an investigation since she had signed the documents. She stated that Mr. Formosa had done her testing and she then signed the certification forms. Dr. Logan initiated an internal affairs investigation and Ms. Gordon subsequently resigned on July 20, 2007.

ASCLAD Audit Conducted by Michael Hurley

After these problems were brought to light, the Chief of the Washington State Patrol demanded an audit of the operational and management practices of the Toxicology Laboratory as they relate to the Breath Testing Program. This audit came under the Risk

Management section of the Washington State Patrol, but was contracted to an independent evaluator, Michael Hurley, an assessor with the American Society of Crime Laboratory Directors Consulting.[ASCLAD]. This audit was conducted during September, 2007. The procedures in place for the preparation and testing of simulator solutions and an assessment of the calculation error on breath test results were major areas in which Mr. Hurley concentrated his efforts. Mr. Hurley made a number of findings in this audit relating to the operational and management practices of the breath test program. He found that there was little communication between the Toxicology Laboratory and the Breath Testing Program. He also found that the Toxicology Laboratory management had not applied the same operational and quality control to the Breath Testing Program that had been applied to other parts of the laboratory. In addition, breath testing functions had not been evaluated by external auditors and were not part of the accreditation by ABFT.

The Toxicology Laboratory ordinarily prepares two different types of solutions for use in the breath testing machines: (1) The first is a 0.08 Simulator External Standard Solution mentioned above; (2) The second is a Quality Assurance Solution used to verify the accuracy and precision of the instruments. Both of these solution preparation procedures require a minimum of three analysts to do the required testing to be certified. However, in actual practice 12-16 analysts performed the tests in order to qualify all to testify in court relating to the solutions. During the audit Mr. Hurley found a calibration error on tests run on the breath test solutions. All of the tests were not calculated for the total number of analysts testing the data. In regard to this problem Mr. Hurley stated the following, "The laboratory policy did not create the problem, but the policy of having all analysts do the testing for convenience of having more people to go to court contributed to the subsequent, identified error."

Mr. Hurley identified a number of findings during this audit. The Washington State Patrol then provided a "Breath Test Audit Summary and Target Date Checklist", outlining agency action and steps to cure the problems that he found. The findings from this audit and recommendations from Mr. Hurley were adopted by the Chief of the

Washington State Patrol and almost all have been put into place. The remainder that have not yet been completed have completion dates and will be finalized during this year.[2]

ABFT Data Quality Audit

An additional audit was conducted on October 24-26, 2007 by the Risk Management Division of the Washington State Patrol to test the toxicology files signed or co-signed by Manager Ann Marie Gordon for the period of time from July, 2005, through June of 2007. The Risk Management Division contracted with the American Board of Forensic Toxicology (ABFT) and auditors Dr. Graham Jones, and Dr. Iain McIntyre as external auditors. In conducting this audit the auditors selected 300 cases at random during the target time period that were signed or co-signed by Ann Marie Gordon. During this review the auditors found ten files with reporting issues. Three cases contained clear errors that should have been noticed on review, but were not. Three cases contained errors that fall into the category of "typographical" errors. Four of the remaining ten cases had errors that were classified as "forensically significant." Some of these may be a matter of differing professional judgment rather than errors.

Drs. McIntyre and Jones congratulated the Toxicology Laboratory and Ann Marie Gordon for establishing two levels of report reviews, which is not done in other labs. The audit report concluded with the statement that although the noted errors were unfortunate, the reviews conducted by Ms. Gordon were professionally done and appear to reflect isolated oversights rather than unprofessional conduct.

Case Law Decisions

The problems associated with Ann Marie Gordon's false certifications and also the errors in the database and computations culminated in a number of court decisions relating to the admissibility of the breath test results in DUI prosecutions.

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[2] See "Breath Test Audit Summary and Target Date Checklist" attached to this report as Appendix #1.

In Arntson v. Department of Licensing, [DOL case] the court admitted the breath test results, but gave them no weight due to the problems associated with the actions of Ms. Gordon and the culmination of errors dealing with the simulator solution. The action to suspend Mr. Arntson's driving privileges was dismissed.

In State v. Gilbert, et al [Skagit County cases], the court denied the motions to dismiss the charges or suppress the breath test results, but was very critical of the Toxicology Laboratory and Dr. Logan.

In State v. Lang, et al, [Snohomish County cases] the motion to suppress the breath test result was granted due to Ms. Gordon's actions.

In State v. Ahmach, et al, [Redmond cases] the court granted the motion to suppress due to Ann Marie Gordon's actions, and the errors committed by the lab personnel. The case was very critical of the Toxicology Laboratory and Dr. Logan's supervision.

Efforts to Correct Problems Discovered

Crime Laboratory

The FLSB under the supervision of Dr. Barry Logan and the Washington State Patrol has taken very thorough steps to examine and solve the problems in the Crime Laboratory relating to Forensic Scientist Evan Thompson and in the Toxicology Laboratory relating to the Breath Test Program.

The crime laboratory peer review, quality control analysis and supervision, were all adequate to identify problems with a forensic scientist's work and rectify them. This was done in an open manner and was remedied. The systems worked in the way that was intended when the checks and balances were put into place in the crime laboratory. In order to fully understand the checks and balances instituted in the crime laboratory it is important to review the audits that are done annually and also the creation of the Standards and Accountability Section (SAS). In 2006 Dr. Logan decided that it was important to create a section devoted to the demand for quality processes and to increase the vigilance of forensic quality issues such as audits and accreditation oversight. This section has been increased from one person to seven full time positions.

In order to insure compliance with ASCLAD/LAB Accreditation Criteria, Washington State Patrol Regulations, legal criteria, CALEA Accreditation Criteria and

Federal Requirements, many audits are required. The following are audits presently conducted on the crime laboratories:

1. Four Quarterly Evidence Audits per year per laboratory performed by the laboratory manager or designee;
2. One 100% Evidence Audit per year per laboratory performed by the Washington State Patrol Risk Management Division;
3. One 10% Spot Evidence Audit per year per laboratory performed by the Washington State Patrol Risk Management Division;
4. Three Firearms Reference Collection Audits performed by the SAS;
5. Six Controlled Substance Reference Collection Audits per year performed by the SAS;
6. One Quality and Technical Audit per year per laboratory performed by the SAS;
7. Six alternating internal and/or External DNA and CODIS Audits per year as required by the Federal FBI Guidelines; (Set up by the SAS;
8. Yearly ASCLAD/LAB Assessments performed by each of the seven laboratories and performed by the Laboratory Manager, monitored by the SAS.

After each audit is completed the SAS completes a report and the Laboratory Manager must file a response. This puts the focus on problems and their solutions. After a solution is reached the SAS Section conducts follow ups to check and see how the problem has been remedied. This program has changed the laboratory system from a reactive to a proactive environment. In addition, the ASCLAD/LAB is converting from a forensically nationally based Legacy Accreditation Program to the International ISO Program based on ISO testing and calibration laboratory criteria. This change will more than quadruple the essential accreditation criteria used, and is based on international standards and applications. The current Legacy Accreditation Program has an external assessment every five years, while ISO has a yearly assessment for the first five years and then adjusted based on the laboratories record of success. This project is the responsibility of the SAS and will result in a better laboratory system and product for the laboratory users.

Toxicology Laboratory

The external and internal audits that were conducted on the Toxicology Laboratory after the disclosure by Ms. Gordon of her false certifications, are certainly indicative of how seriously the Chief of the Washington State Patrol viewed this problem. In addition, after all of the audits, the Washington State Patrol and the FLSB have adopted all of the audit findings, in an effort to prevent this from ever happening again and to insure that checks and balances will be adequate to forestall this in the future.

In order to insure compliance with ABFT Accreditation Criteria, Washington State Patrol Regulations, legal criteria, CALEA Accreditation Criteria and Federal Requirements, many audits are required. The following are audits presently conducted on the Toxicology Laboratory:

1. Four Quarterly Evidence Audits per year performed by the laboratory manager or designee;
2. One 100% Evidence Audit per year performed by the Washington State Patrol Risk Management Division;
3. One 10% Spot Evidence Audit per year performed by the Washington State Patrol Risk Management Division;
4. One ABFT Accreditation Audit [The Toxicology Laboratory was accredited last year and will go through a mid-year assessment this year];
5. SAS Audit to insure the findings from the lat year's audits are being implemented;
6. One evidence handling audit performed for the CALEA Accreditation.

After each audit is completed the laboratory manager must respond to any findings and make certain that problems are remedied. In addition, the Toxicology Laboratory is converting from ABFT Accreditation Program to the International ISO Program based on ISO testing and calibration laboratory criteria. This change will more than quadruple the essential accreditation criteria used, and is based on international standards and applications. ISO has a yearly assessment for the first five years and then is adjusted based on the laboratories record of success.

Conclusion

It is extremely unfortunate that Toxicology Manager Gordon filed false certifications on tests that were conducted by another analyst. The fact that this was done

by a high level laboratory employee is repugnant and antithetical to the goals and standards of the entire laboratory system. This was not a certification that was essential to any part of the program and truly defies logic. This action has prevented the utilization of breath test results in courts all over the State of Washington, and has raised a cloud of doubt over the Toxicology Laboratory. The crime and toxicology laboratory employees are a very dedicated, hard working, honest group of people and certainly did not deserve to have the actions of two people affect the public perception of their work. Dr. Logan has dedicated many years of his professional life to the goal of creating a laboratory system that is dedicated to the most efficient, well run, and ethical standards of forensic science. Under his leadership the Crime Lab and Toxicology Laboratory systems have grown to attempt to meet the need in this State for such services, and to keep abreast of the cutting edge technology in forensic science. The Toxicology Laboratory has doubled in size under his leadership and has achieved national accreditation. The crime laboratories have greatly increased in size, are fully accredited and have placed a major focus on DNA casework. The focus that Dr. Logan placed on quality assurance and the creation of the SAS division will ensure high quality laboratory processes and results in the future.[3]

The Forensic Investigations Council makes the following recommendations for the FLSB:

1. Adopt all of the findings of the audits conducted as set forth above.[4]
2. Appoint a State Toxicologist as a separate position from the FLSB Chief.[5]
3. Appoint a Laboratory Manager position for the Toxicology Laboratory.[6]

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[3] We are not unmindful of the criticism of Dr. Logan by a number of judges in the above-cited opinions. However, everyone who supervises a large number of employees, which does not include the aforementioned judges, realizes that sometimes employees do not follow the rules, do not follow directives and do not follow the law. If this is done in a manner which is not readily apparent, the results can be disastrous. That is exactly what happened here. The captain of the ship ultimately is always responsible, but it does not mean that he was asleep at the helm or was complicit in the activities of the employee or employees. Dr. Logan has built an extremely excellent crime laboratory and toxicology system in the State of Washington. He has contributed more to the forensic laboratory systems than anyone in the State. His vision and organizational ability will be felt in this system for years to come.

[4] This has been done by the Washington State Patrol and all will be effective by mid year, 2008.

[5] The duties associated with the State Toxicologist and the Bureau Chief of the FLSB are too numerous for one person to complete. [This recommendation has been completed and Dr. Fiona Couper was appointed as the State Toxicologist effective on March 10, 2008].

[6] This position has been filled for the State Toxicology Laboratory and will provide support for the State Toxicologist.

4. Complete the ISO accreditation on both the Crime Laboratory System and the State Toxicology Laboratory System.
5. Expand the current Standards and Accountability Section to ensure vigilance for quality processes and to conduct audits and oversee accreditation over both the Crime Laboratories and the State Toxicology Laboratory.
6. Management of the crime laboratories and the toxicology laboratory should constantly monitor the staffing levels to insure adequate staffing levels to process the lab requests in a timely manner and to insure high quality, thorough casework.

The problems described above that occurred in the Toxicology Laboratory cannot overshadow the excellent, high quality forensic casework that has been completed day in and day out by the employees of the Forensic Laboratory Services Bureau. The above recommendations will ensure that these problems will not reoccur and will increase the quality of the laboratory results.

David S. McEachran
Chairman FIC

APPENDIX 1

Type of Audit	Target Date	Action Step	Completion date
BTA	08/01/07	Breath test attend training for new program offered by ASCLD-LAB for accreditation	done
BTA	09/01/07	Simulator solution certification database form updated to include date beside analysts name relects the date analyzed	done
BTA	10/05/07	Update & develop procedures for preparing, testing, certifying, and conducting quality control on simulator external solutions and QA solutions	done
BTA	10/05/07	Quality assurance check performed by breath test section on receipt of solution Recalulate results	done
BTA	10/05/07	Documentation of absolute ethanol w/simulator solution log	done
BTA	10/05/07	Language standardized to reduce any confusion about what documents are being referred to	done
BTA	10/05/07	Revisions to simulator solution & QA procedures dated 10/5/07 and beyond, require to be included in batch file.	done
BTA	10/05/07	Validation of filemaker database Old file locked to prevent editing or tampering	done
BTA	10/05/07	4-stage process for review of analytical data. Toxicology Supervisor assigned to oversee this process.	done
SSA	11/01/07	Refrigerator/freezer moved to vault. Evidence moved to vault each night.	done
SSA	11/01/07	Seattle Crime Lab PEC assigned to ToxLab 40% time.	done
BTA	11/07/07	Weekly training sessions for Tox Staff	ongoing
BTA	11/15/07	Anaalysts divided into 2 teams for simulator solution batches. 8-9 analysts performing tests rather then 16	done
SSA	11/22/07	Save sample process assigned to Barry Fung.	done
SSA	12/14/07	Audit of 2005 Samples	done
BTA	12/19/07	Joint meeting between Tox staff & Breath test program staff	done
SSA	01/01/08	Seattle Crime Lab PEC = ToxLab PEC 100%	done
SSA	01/01/08	Access to evidence vault limited to PEC & Supervisors only	done
SSA	01/01/08	Filemaker Pro installed on evidence officers computers	done
SSA	1//2008	Return/disposal of evidence process for PCME & KCME	done
SSA	1//2008	Steering committee meetings to start for returning ALL SAMPLES	done

APPENDIX 1

Type of Audit	Target Date	Action Step	Completion date
SSA	02/01/08	Identify conflicts between lab & agency policies	done
SSA	02/01/08	Draft changes assigned to PEC Linda Edwards & Susan Sabillo	done
SSA	02/01/08	2nd ToxLab PEC expected hire date	done
SSA	02/01/08	Assessment of CITE system before final decision on LIMS	done
SSA	02/01/08	Recommendations for improvement on save process	done
BTA	02/04/08	Summary of the process used for calculating with mean and standard deviation - prepared by Breath Test program staff Incoporate as an appendix in SOP	done
SSA	02/15/08	Draft policy on state wide evidnce policy for Toxicology Laboratory due from steering committee	done
SSA	03/01/08	2 PEC's responsible for receiving evidence, entering into evidence system, etc	done
BTA	03/01/08	IIA compliant quartely external audits will be developed by FLSB Standards and Accountability Section	done
BTA	04/01/08	Technical work group to be formed by new Toxlab management staff	
SSA	04/01/08	Audit of 2006 & 2007 Samples	in progress
BTA	07/01/08	Application for accreditation ASCLD-LAB	
BTA	07/01/08	Additional communication venues developed by Technical working group.	
BTA	07/01/08	Periodic internal audits on simulator solution program	
BTA	07/01/08	Create new database w/individual passwords and audit capabilites.	
BTA	07/01/08	Technical group will develop intergrated SOP for all aspects of breath test support functions by lab	
SSA	07/01/08	Return of all evidence upon completion of analysis	

Washington State Patrol

REPORT TO THE CHIEF

FORENSIC LAB SERVICES BUREAU

Evidence Audit
Toxicology Lab
Seattle, WA

Issue Date
September 4, 2007

RISK MANAGEMENT DIVISION

Dr. Donald Sorenson, CFE

EXECUTIVE SUMMARY

At the direction of the Chief, the Risk Management Division conducted an audit of the evidence system at the Washington State Patrol's Toxicology Laboratory in Seattle. Fieldwork was conducted August 6-15, 2007.

Procedures, processes, operations, and organizational efficiencies regarding the handling of evidence were examined to assess accuracy, compliance, and effectiveness. Issues were noted in the following areas:

1. **Division Manual** - A review of the division's Standard Operating Procedure (SOP) manual revealed some policies, rules, or regulations addressing the handling of property and evidence in conflict with department policies. Prior recommendations were made by RMD regarding these issues and can be found in attachment A.

2. **Evidence Intake/Packaging, Storage, and Disposal** – Approximately sixteen different personnel process the intake and storage of evidence and access the evidence vault on a continual basis. Incomplete records of the "Saved Samples" freezer prevented accurate accounting of the inventory. Timely disposal of evidence from adjudicated/closed cases did not occur.

3. **Case Files** - Files were generally well organized. Some inconsistencies in documentation were noted.

4. **Mandatory Audits** – Neither the required audits of the "Saved Samples" freezer, nor the quarterly audits, were performed.

5. **Supervision** – The Lab Manager performed the majority of tasks associated with the disposal of evidence in addition to other duties associated with the operation of the laboratory. Delegation of duties to the Quality Lead Technician was limited.

SCOPE

The audit scope was to test the accounting of evidence held in the "Saved Samples" freezer. Focusing on the handling and storage of evidence in the evidence vault at the Toxicology Laboratory, the audit included an inventory of contents held in the "Saved Samples" freezer and a review of approximately three hundred (300) case files for the years 2001-2007. Additionally, compliance testing of records to all governing policies, rules, regulations, and statutory requirements was performed. All items and paperwork presented were

thoroughly examined for compliance, accuracy, processing methods, and accountability.

Accountability of Evidence

Audit team members found it necessary to conduct an inventory of the "Saved Samples" freezer. The auditors expanded portions of the existing evidence database to include 700 non-recorded cases and added a descriptive field for all items found within the freezer.

Methodology

The audit included a visual review of all paperwork and case files associated with the handling of evidence. RCW and CALEA compliance/non-compliance was determined through first-hand examination of supporting documents and observation of personnel.

Fieldwork included a review of the division manual and select Toxicology Lab computer databases, interviews of personnel, and a visual accounting of the evidence stored in the "Saved Samples" freezer. Fieldwork was completed on August 15, 2007.

Audit findings are detailed on the following pages. Twelve recommendations appear at the end of the write-up.

Audit Findings

Division Manual

Finding: Division manual "evidence storage area" procedures are in conflict with department policies. Prior recommendations from RMD have not been incorporated.

Description of Condition: The division manual does not restrict access to the evidence storage area. Approximately sixteen people have unrestricted access to the evidence vault at all times. Additionally, the "temporary storage" location housing evidence recently delivered and awaiting initial analysis is not located in the evidence vault. This refrigerator/freezer is located in the work area utilized by the scientists and is accessible to anyone entering the Toxicology Laboratory.

At Dr. Logan's request, RMD provided written recommendations for the division manual in April 2005. The majority of RMD's recommendations were not incorporated into the 2007 manual revisions.

Cause of Condition: Unknown.

Effect of Condition: The division manual provides standards regarding policy and procedural requirements. When those of the division conflict with those of the department, confusion emerges and non-standard practices develop. For example, the evidence vault door, which is a keycard restricted entry, is often "propped" open with the use of an implement (an empty tube storage rack or a container lid) placed between the door and the door jamb. During a previous audit, the Quality Lead Technician was questioned about this practice. The response provided was that the door was only propped open when a scientist was working inside of the vault. This practice originated due to the warmth caused by the seven freezers in the room. During this audit, team members arrived and found the evidence vault door propped open with a biohazard container lid. There was no one in the evidence vault and no scientists present in the work areas adjacent to the vault. It is unknown how long the door was propped open. Additionally, while the door was propped open, scientists entering the vault did not swipe their keycards. Audit team members observed numerous scientists entering the vault and removing evidence from the other freezers. There was no record of the scientist's entries on these occasions.

In April 2005, Dr. Logan requested that RMD review proposed changes to the Toxicology Laboratory Standard Operating Procedure (SOP) manual. A three page list of recommendations was forwarded to Dr. Logan. A review of the manual indicated that the majority of the recommendations were not incorporated.

At the start of the fieldwork portion of the audit (August 6, 2007), the audit team posted a notice restricting access to the "Saved Samples" freezer. The notice simply requested that personnel refrain from accessing or replacing items in the "Saved Samples" freezer until the conclusion of the audit. Two days later (August 8, 2007), the audit team observed that the bottom two shelves of the "Saved Samples" freezer had been accessed and "straightened-up." No explanation was offered or discovered as to why the notice was ignored.

Evidence Intake/Packaging, Storage, and Disposal

Finding: Access to the evidence vault area is restricted to authorized keycard holders. The restriction is not enforced. The computer database record of the "Saved Samples" freezer was found to be incomplete (it did not contain any description of the evidence held). Timely disposal of evidence from adjudicated/closed cases has not occurred.

Description of Condition: Access to the evidence vault is restricted by a keycard device. Approximately sixteen individuals have access to the evidence vault. Additional personnel may access the vault at any time when the evidence vault door is propped open. Access to the scientist's work areas is also restricted by keycard devices, but is also accessible by additional personnel. There is a refrigerator/freezer appliance storing newly arrived evidence in preparation for initial testing in this area. All evidence is not stored in the evidence vault. This is a direct violation of both department policy and CALEA standards.

Responsibility for the "Saved Samples" computer database is shared and assigned to one scientist at a time. The responsible individual is provided a copy of the database from the previous individual responsible for maintaining it. If errors occur, they are passed along as there is no validation of the accuracy of the information when the database assignment changes. The database used at the Toxicology Lab for the "Saved Samples" has no description field for the evidence stored. It is not possible to determine what evidence is actually stored in the freezer short of viewing it directly. Case files also contain a description of the evidence items submitted, but file notations regarding movement of evidence to the "Saved Samples" freezer is inconsistent. Validation is lacking.

A review of the case files revealed that timely disposal of evidence from adjudicated/closed cases is not occurring. A number of files contained documentation permitting the destruction of the evidence, or requesting a return of the samples provided, but the items were still stored in the "Saved Samples" freezer. During this audit, no analysis of intake versus disposal was conducted due to time constraints and inaccessibility of records - some of which could only be accessed by the former lab manager's computer.

Cause of Condition: Failure of personnel to comply with written policies and procedures. Failure of supervisor to access appropriate resources to ensure authenticity of computer database information. Failure of supervisor to delegate responsibilities.

Effect of Condition: An environment developed that operates outside the guidelines of the Washington State Patrol. Accountability to the chain of

command was noticeably absent as was delegation of responsibilities from the lab manager to Toxicology Lab personnel. Guidance in the form of written policies and procedures address testing processes in evaluating evidence, but minimal direction regarding chain-of-custody standards is provided.

The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures.

Case Files

Finding: Documentation in case files is inconsistent.

Description of Condition: A review of the case files for "Saved Samples" during the years 2001-2007 was conducted. Discrepancies were minor and took the form of incomplete or missing notations and paperwork.

Cause of Condition: High rate of staff turnover combined with failure of supervisor to provide adequate training and oversight to comply with established policies and procedures.

Effect of Condition: Successful prosecution of cases is compromised. The department is unnecessarily exposed to potential litigation.

Mandatory Audits

Finding: *Mandatory audits are not being completed.*

Description of Condition: The division manual identifies an audit of the evidence stored in the "Saved Samples" freezer. The audit is to provide for a 95% confidence level with a +/-5% confidence interval. The lab manager indicated in a memo to Dr. Logan that she would have a 100% inventory of the "Saved Samples" freezer completed by March 30, 2005. The audit concluded that the annual audit of the saved samples did not occur at any time during the last two years as the Toxicology Laboratory did not have a complete inventory of the "Saved Samples" freezer from which to generate a report.

Quarterly audits were not conducted for the latter half of 2006, and no reports have been received by RMD for 2007.

Cause of Condition: Failure to comply with established policies and procedures requiring an annual audit of the "Saved Samples" freezer.

Effect of Condition: Non-standard evidence handling procedures and insufficient documentation to ensure the same jeopardizes operational performance as well as CALEA accreditation.

Supervision

Finding: *Proper delegation of tasks by the lab manager did not occur.* Personnel are not held accountable for following departmental policies and procedures.

Description of Condition: The lab manager had a very large staff to supervise and voiced unwillingness to delegate tasks to employees that would "take them away from their primary tasks." As a result, disposal of evidence did not occur on a regular basis and, when it did happen, appeared to coincide with that time immediately before an audit.

Responsibility for completion of the Quarterly Audit was given to the Quality Lead Technician. The lab manager did not hold the Quality Lead Technician accountable for failure to complete and submit the quarterly audits.

Cause of Condition: *Failure of the lab manager to take appropriate corrective* action in a timely manner.

Effect of Condition: Non-standard evidence handling procedures and failure to perform required audits jeopardizes operational performance as well as CALEA accreditation.

Recommendations

1. Immediate relocation to the evidence vault of the refrigerator/freezer housing incoming evidence.

2. Immediate temporary reassignment of one Property and Evidence Custodian from the Seattle Crime Laboratory to oversee the movement of evidence items in and out of the evidence vault for the Toxicology Laboratory until additional personnel can be hired.

3. Immediate lockdown of the evidence vault, thereby limiting access to the Property and Evidence Custodian and Quality Lead Technician only.

4. Immediate 100% inventory of all evidence held both in the evidence vault and at any other locations on the premises.

5. Establishment of a computer database system capable of tracking evidence items and reporting their status.

6. Transfer of database tracking of saved samples responsibilities to the Property and Evidence Custodian responsible for evidence handling for the Toxicology Laboratory.

7. Disposal of all evidence from adjudicated/closed cases.

8. Return of all samples submitted by the Pierce County Medical Examiner.

9. Addition of two Property and Evidence Custodians: one to oversee the vault and a second to oversee the file room and all paperwork associated with the evidence items.

10. Re-evaluate the procedure/policy addressing the long-term storage of evidence for other agencies.

11. Bring the Toxicology Laboratory's SOP into compliance with department evidence handling policies and procedures.

12. Copy the RMD with respective quarterly audit reports.

Acknowledgements

An audit requires the participation of individuals familiar with the processes in place and able to respond to questions for clarification. Toxicology Laboratory personnel were courteous and professional throughout this process. Without their understanding and assistance this task would have been much more difficult.

Special thanks to: Professional Staff Kim Miller, Sandra Distefino, and Forensic Scientists Brianne Akins and Amanda Black who provided information necessary to complete the task. RMD would also like to thank Property and Evidence Custodians Susan Sabillo and Barry Fung who assisted with completion of the inventory associated with this audit.

Respectfully submitted,

Dr. Donald Sorenson, CFE
Administrator: Risk Management Division

04 Sept 2017
Date

Destruction File **Non-Compliant**
Violation: RCW 40.14.160

No file was available for review
One (1) "Destruction Authorization Form" was found. Ms. Gordon indicated that she has not had time to file it.

Recommendation: Review all files and follow prescribed procedures for destruction or archiving as necessary. Develop and maintain a "Destruction Authorization" file.

Databases **Non-Compliant**
Violation: RCW 40.14.060.

A current listing of databases used at the Toxicology Lab was provided by Linda Collins. The list includes:

- Tox Database
- Discovery Excel (PD Tracking)
- Saving Samples Database

No databases were able to be audited for retention as no retention schedule has been established.

Recommendation: Schedule immediately.

Disclosure Requests **Non-Compliant**
Violations: RCW 42.17.260
Regulation Manual 6.01.040 Public Records Requests
CALEA 46.1.4, 54.1.1, 54.1.3, 82.1.1, 82.2.5.

Ms. Gordon refers to all records requests received by the Tox Lab as Discovery requests. Under WSP Regulation, all such requests are all to be retained and tracked as disclosure requests. Tox Lab's SOP Manual indicates adherence to WSP regulations for disclosure. Ms. Gordon indicated that that she didn't have time to follow WSP policies and therefore wouldn't be doing it.

- Redactions are being made without exemptions being explained to requestor.
- Not using WSP database for tracking – using excel spreadsheet.
- Not keeping requests in proper files, but rather in binders all together, or in envelopes.
- No tracking # assigned.
- Blood work requests are filed by the case #, BAC requests alphabetically by the requestor and/or date.

- No billing being done for non subpoenaed requests.

Recommendation: That the Bureau Director be informed of the gravity of these matters and request a mitigation plan within thirty (30) days.

Performance Records (DOC Books) **Non-Compliant**
Violations: Regulation Manual 7.01.030, 15.00.030
CALEA 26.1.8, 35.1.10, 35.1.13

- No signed SCAN logs were found in the files.
- Two (2) of four (4) records reviewed contained materials past the retention period.
- One (1) Doc book was not transferred with employee when he transferred out of the Tox Lab.

Recommendation: Review all DOC books for proper contents and take appropriate inclusion or purging actions.

Case Files **Non-Compliant**
Violations: Regulation Manual 10.04.100.
CALEA 11.4.2, 11.5.1, 11.5.2, 11.5.1, 11.6.4

Multiple sets of copies were found in the files.
Form numbers were present on only a few of the forms utilized.
Recommendation: Clarify and identify what documents are to be included in case files. Ensure that all forms utilized have been assigned a WSP form number.

TARs **Non-Compliant**
Violation: TAR Manual

- TARs are stored in various places, with majority being stored in three-ring binders.
- TARs are unsecured.
- January 1, 2000 to June 30, 2000 TARs were discovered in an off-site storage area.
- Copy of an original TAR found with an attached note that read: "Original at HRD?"

Deleted: <#>One (1) TAR was found in an expandable file folder with eight (8) other employees.¶

Recommendation: Secure all TARS at one location at the respective employee's duty station. Create and utilize consistent filing system, either by date or employee.

Simulator Solution Logbooks **Status: Non-Compliant**
Violation: Retention: Ten (10) years for in-house records. No copies of archived files/records are to be kept locally.

A random sample of the Simulator Solution Logbooks (records of quality control results for simulator solutions produced by the lab) dating from 1991-1992, 1995-1997, and 2001-2003, were examined.

- Thirteen (13) years worth of records were found on file.
- All files examined were copies; no originals found.
- Ms. Gordon indicated that the originals were archived. This has not been confirmed.

Recommendation: Originals files/records are to be retained for full retention period, and then archived. Copies are to be destroyed.

Email **Status: Non-Compliant**
Violation: Retention

Checked four (4) employee's email systems. All four (4) had emails on the server more than a year old. Two (2) had emails 2-3 years old.

Recommendation: Review retention rules related to email and perform required compliance-driven activity.

Visitor Book **Compliant**
Recommendation: There is a five (5) year retention requirement. Current visitor book is a bound volume with multiple years of records. It contains pages which cannot be easily removed for destruction. Therefore it is recommended that the lab use a binder with removable pages.

Forensic Toxicology Case Files
The technical content of the files prohibited the auditors from determining a measure of accuracy for file contents.

Recommendation: A master list of required file components is to be prepared.

CHRISTINE O. GREGOIRE
Governor

JOHN R. BATISTE
Chief

STATE OF WASHINGTON
WASHINGTON STATE PATROL
General Administrative Building, PO Box 42600 • Olympia, WA 98504-2600 • (360) 753-6540 • www.wsp.wa.gov

February 12, 2008

Chief John R. Batiste
Washington State Patrol
PO Box 42601
Olympia WA 98504-2601

Dear Chief Batiste:

As of February 12, 2008, I am submitting my voluntary resignation from the exempt position of Forensic Laboratory Services Bureau Director/State Toxicologist with the Washington State Patrol. I agree to officially resign from my employment with the Washington State Patrol on April 30, 2008.

My last official day as the Forensic Laboratory Services Bureau Director/State Toxicologist will be March 14, 2008. From March 14 through April 30, 2008, I will be available to answer any operational questions and to respond to any subpoenas that may be served regarding the Toxicology Lab.

Sincerely,

Dr. Barry Logan

BL:sjs

ISSUE PAPER PREPARED BY DR. BARRY LOGAN

This is a summary of the basis for the current legal challenges to simulator solutions prepared by the State Toxicology Laboratory and used in the state's evidential breath testing program. Simulator solutions are alcohol and water mixtures used to calibrate and check the calibration of evidential breath testing instruments.

Issue:

Following the departure of the Toxicology Laboratory manager in July, ongoing records review in the State Toxicology Laboratory has uncovered errors in processes and data that may impact breath test results in DUI cases.

Background:

In March 2007, WSP received an anonymous complaint alleging that "simulator solutions were being falsified as far as certifications". This complaint was assigned to Ms. Ann Marie Gordon, the Toxicology Laboratory manager to investigate. She evaluated the issue by tasking the Quality Manager to audit the records through the beginning of 2007 to ensure analytical data to support the results reported. The simulator solution process was also discussed with staff. Neither analytical review nor staff input revealed discrepancies.

At a follow up meeting with Ms. Gordon and Dr. Logan a few days later, she indicated that she was delegating testing to one of her staff due to time constraints. It was concluded her delegation of the testing was likely the behavior that was the subject of the complaint, and she was directed to stop delegating that testing. There was no expectation that she personally test simulator solutions in her capacity as laboratory manager. She complied with that direction.

In July 2007, a second call was received by WSP on the same subject containing more specificity. In addition to delegating the testing of simulator solutions, the complaint alleged Ms. Gordon had been signing a declaration under penalty of perjury that she had personally examined and tested the solutions. Affidavits from early 2007 posted on the WSP web site were reviewed and confirmed the substance of the complaint. The matter was referred to the WSP Office of Professional Standards (OPS). It is important to note that there is no evidence that results were being fabricated or falsified. All the tests reported were being correctly performed, however the alleged misconduct was that Ms. Gordon was taking credit in a sworn statement for having personally performed the test.

The complaint and accompanying documentation was reviewed and a criminal investigation to determine potential evidence of false swearing was initiated by the WSP. Ms. Gordon resigned from the WSP on July 20, 2007 when notified that criminal and administrative investigations would be conducted.

The WSP criminal investigation was completed and referred to the King County Prosecutor's office for a charging decision. On September 20, the WSP was verbally notified by King County that charges will not be filed due to the absence of intent on the part of Ms. Gordon.

In July, exhaustive reviews of toxicology laboratory processes and procedures were initiated. A review of calculations used to determine the average alcohol concentration of the simulator solutions revealed an error in the programming of the database, which omitted some of the test results from the average value. This calculation error occurred on 33 batches of simulator solutions prepared and tested between August 2005 and July 2007. Analysis of the impact of the error identified a potential material impact on eight breath tests conducted on one instrument in Spokane (out of ~70,000 tests statewide).

WSP immediately notified the prosecutor's office and continues the process of contacting those individuals.

In early September an audit of the simulator solution process was initiated by WSP, using an outside auditor. That report is expected to be delivered to the WSP in October. During the audit process, additional errors in the simulator solution database records have been identified, including inconsistent dates, transcription and data entry errors, and an error in the calculation of the standard deviation. The errors are mostly clerical, or affect numbers in a mathematically insignificant way, but it may be argued that they have legal significance. Some of the errors may affect the computed average for some simulator solutions in the third or fourth decimal place. WSP is working to secure independent experts review its process for identifying, reporting, and publishing corrections of these errors.

At a Department of Licensing (DOL) hearing on September 10, 2007, incomplete testimony and evidence concerning the above issues led to an adverse ruling for the state which may impact future license suspensions. Defense attorneys argued that employees from the State Toxicology Laboratory had committed perjury by signing affidavits containing the calculation error result. Without any legal representation for the state, these allegations were not rebutted.

Analysis:

The above deficiencies are traced to the following root causes:

1. Laboratory management and staff were overtaxed leading to inadequate delegation of authority and accountability. A survey has identified that the Washington State Toxicology Laboratory has a per FTE workload two to five times that of similar state labs. Management focus was highly attuned to

customer needs, which were successful. However, this was not balanced with attention to internal controls and agency policy compliance.

2. The Laboratory did not utilize an external process for evaluating the original complaint regarding the certification of simulator solutions.

3. The simulator solution testing process was a legacy program which had grown in scale and become overly complex due to the addition of staff (each solution tested over seventy times) without any assessment of its liabilities or the need for that complexity.

4. The process had been in place for over twenty years and had gone unchallenged, leading to complacency. This in turn led to under-emphasis of the significance of the procedure during staff training.

5. The process was a peer-to-peer reporting process with no end point supervisory or management review for accuracy.

6. Although the Toxicology Laboratory was accredited in 2005 by the American Board of Forensic Toxicology (ABFT) – one of only 22 laboratories in the country to be so accredited - the accreditation does not encompass the simulator solution process so there had been no external review of procedures or risk.

7. Written laboratory procedures were not comprehensive, and were open to varied interpretation by staff revealing management and training needs.

8. Washington State has a very aggressive and experienced DUI defense bar, which shares resources, insight, and market issues and challenges around the state leading to higher scrutiny than experienced in other states.

9. Inconsistent communication between DOL and the WSP Toxicology Laboratory has lead to incomplete information being provided at administrative hearings.

Remedies:

The following steps have been taken to address the root cause deficiencies.

1. Mr. Kevin Jones, Laboratory Accreditation Manager for the Crime Laboratory Division has been assigned to manage the change process in the Toxicology Laboratory. Mr. Jones brings fifteen years of management and supervision in the WSP to this role. He is an expert in ISO (International Organization of Standards for Forensic Laboratories) standards and well acquainted with WSP policies and regulations.

2. Mr. Jones' priorities have been assigned as follows:

   i) Pursue all means to restore public confidence in the Laboratory and meet stakeholder needs.

   ii) Work with WSP risk management to identify any remaining weaknesses or deficiencies in the simulator solution process, and conduct any necessary retraining.

   iii) Conduct the necessary notifications to prosecutors, defendants and the courts through the WSP website and other means.

   iv) Assess the external audit report, once available, and secure additional auditing as necessary.

v) Re-establish and hire a full time state toxicologist (PhD, ABFT Certified) to provide full-time, technical program oversight.

3. An assistant attorney general with special responsibility for toxicology issues is being retained by the WSP to assist the Laboratory, the DOL and County prosecutors in consistently addressing these issues.

4. Laboratory procedure will continue to be scrutinized to identify changes and improvements needed to clarify each individual's role and the steps required. Additional layers of validation, documentation and supervisory review are being added to the simulator solution preparation and testing process.

5. The WSP will pursue ongoing discussions with the Forensic Investigations Council for additional oversight of the laboratories and a consistent process for dealing with complaints regarding quality or allegations of impropriety.

6. ASCLD-LAB International, an ISO based forensic accrediting body is establishing accreditation standards for breath alcohol programs. WSP is participating in this previously unavailable process and will take steps to become one of the first accredited programs in the nation.

7. WSP has requested ABFT, the Laboratory's accrediting body, to conduct a data quality audit. This will be performed in October 2007.

8. WSP is seeking legislative funding to restore a full time state toxicologist and additional staff to provide better technical management oversight of the laboratory, reduce the risk of technical errors, and improve the quality standards.

Unrelated but linked events:

Ms. Gordon, the former Laboratory manager is also the individual who in 2004 inadvertently destroyed the blood samples in the ongoing vehicular homicide prosecution of Frederick Russell in Whitman County. In that case the defense has sought to impeach Ms. Gordon's credibility by invoking the recent allegations, making the two events appear to be related when they are not.

Also revealed in the Russell trial are internal WSP audit reports critical of the Laboratory's sample handing and storage methods. The reports show procedures that are out of compliance with WSP requirements, and describe inadequate documentation of destruction of specimens, which were authorized to be destroyed. Audit recommendations made to Ms. Gordon by the WSP auditor in 2005 for changes in procedures were not immediately implemented.

The WSP and the Toxicology Laboratory are committed to scientific excellence in support of Washington's evidential breath testing program, and are acutely aware of the need for public confidence and accountability.

SEATTLE POST-INTELLIGENCER
http://seattlepi.nwsource.com/local/183203_crimelab23.html

Oversight of crime-lab staff has often been lax

Friday, July 23, 2004

By RUTH TEICHROEB
SEATTLE POST-INTELLIGENCER REPORTER

A crime lab chemist snorts heroin on the job for months, stealing the drug from evidence he was testing.

A senior DNA analyst lies to a defense attorney, fearing his testing error would be used to undermine a case against a suspected rapist.

A forensic scientist is accused of sloppy drug analysis, after a national watchdog group complains about his misleading court testimony.

related features

- Crime labs too beholden to prosecutors, critics say
- Previously: "Shadow of Doubt" special report

In all of these cases, internal checks and balances failed. The system for double-checking work broke down in one case. In another, officials overlooked warning signs until faced with a crisis. And the work of discredited senior staffers was almost never audited, an investigation by the Seattle Post-Intelligencer found.

A close look at the Washington State Patrol crime labs reveals a stressed system in which officials have been slow to deal with misconduct by long-time employees -- dating back to one of the first scientists hired more than 30 years ago.

Crime lab officials say these are isolated incidents that don't reflect the high-quality work done by their 120 employees on thousands of cases a year, despite caseload and budget pressures.

Washington State Patrol crime labs' Director Barry Logan says most of his forensic scientists do top-notch work on thousands of cases each year.

"It's a constant process of learning from our mistakes and trying to do better," said Barry Logan, director of the State Patrol's Forensic Laboratory Services Bureau.

A single inept or dishonest forensic scientist, though, can undermine the integrity of the legal process, given the pivotal role the crime labs play in determining a suspect's guilt or innocence.

"It's only as good as the weakest link," said Steven Benjamin, co-chairman of the forensic evidence committee for the National Association of Criminal Defense Lawyers. "When a laboratory has an inept or dishonest examiner and an inadequate response, then that whole lab becomes the weakest link."

A review of two dozen crime lab disciplinary records also raise questions about the professionalism of some scientists on the state payroll. In the past five years, a lab supervisor was caught viewing pornography on his office computer, a lab manager was fired for sexually harassing female co-workers and a DNA analyst was found sleeping on the job.

Crime labs are subject to minimal federal or state oversight. Even the last industry-led, voluntary accreditation review of Washington's system, however, found problems in all seven labs in 1999.

The lack of government scrutiny has become a national issue in the wake of high-profile scandals plaguing crime labs from Houston, where shoddy DNA work led to a wrongful conviction, to a string of problems at the FBI's pre-eminent facility in Quantico, Va.

Two months ago, Oregon attorney Brandon Mayfield was jailed for two weeks as a material witness after FBI fingerprint experts mistakenly linked him to the March 11 Madrid bombings that killed 191 people.

Over the objections of Spanish investigators, three veteran FBI fingerprint examiners declared they had a "100 percent" match with Mayfield -- a claim soon proved to be false.

The case not only prompted questions about the reliability of fingerprint evidence; it left people wondering whether experienced forensic scientists had let biases cloud their judgment.

And it lent credence to the complaint that too many crime lab staff see themselves as cops in white lab coats rather than objective scientists.

'I tried to conceal it'

A simple error on a DNA test would lead to the undoing of 16-year forensic scientist John Brown.

Embarrassed by his mistake, Brown made a decision that would shatter his credibility and impugn the integrity of the entire system.

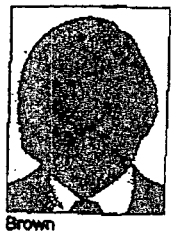
It began when Seattle police submitted vaginal swabs in an unsolved rape case to the state crime lab. Brown came up with a DNA profile of a possible male suspect but didn't find a match the first time he searched the convicted-felon DNA databank in November 1997.

During an internal review, his boss, Don McLaren, noticed that Brown had missed one of the markers in the DNA test. Brown reran the correct profile and produced a match with Craig Barfield, then 35, who had served time for burglary convictions.

Brown issued a final report linking Barfield to the DNA profile, but made no mention of his first test.

"A mistake like this is like leaving fresh salmon on the counter and ... leaving your cat in the kitchen," Brown, 54, said recently, speaking publicly for the first time.

"I saw it as much more harm that the defense would get hold of the data saying there's no match in the database, and they'd prance around and say it proves the innocence of their client."


Brown

He also destroyed his erroneous draft report, a common practice at that time, according to Brown and McLaren, but one that contradicted the legal system's basic tenet of full disclosure.

A few months later, in April 1998, Barfield's public defender, Stephanie Adraktas, grilled a nervous Brown about discrepancies in his lab notes during a pre-trial interview.

By then, Brown said he knew Barfield had been accused of a previous rape, and wanted to help bolster the case. "I didn't want this mistake to come up," he told the P-I. "So I tried to conceal it."

One of the founders of the lab's DNA section almost a decade earlier, Brown had testified in 40 DNA cases. He'd tested evidence in 300 DNA cases, according to his resume.

He said defense attorneys had begun personally attacking forensic scientists because they could no longer challenge irrefutable DNA evidence in court. They wanted to "destroy him."

"The legal stuff was a battlefield," he said.

During the interview with Adraktas, Brown was at first evasive, then lied about the existence of the draft report. As the hours ground on, Adraktas extracted the truth. "Every defense attorney wants to go out hunting and to capture a forensic scientist and I was the big buck with a full rack," Brown would later tell State Patrol investigators.

Brown's attitude stunned Adraktas. "I do find it disturbing and sad that someone whose job was to be objective and evaluate evidence fairly would do this," she said. "It wasn't his role to decide if the charged person was guilty. That was up to a jury."

To do damage control, King County Deputy Prosecutor Steven Fogg immediately sent the crucial DNA evidence to a private California lab, which confirmed the match with Barfield.

At Barfield's trial two years later, Brown, who had just been promoted to supervisor of the lab system's DNA program, admitted that he'd lied about his first test.

The State Patrol put Brown on administrative leave and launched an internal investigation. Administrators concluded Brown's credibility was tarnished, and his "untruthfulness" could be used to discredit his prior work – and the entire system.

On the verge of being fired, Brown resigned in September 2000.

The lab, in response, began limiting defense attorneys to two-hour time blocks during pre-trial interviews to ease psychological pressures on forensic scientists.

"I'm not going to defend what John Brown did," said Logan, the crime labs chief. "He got into a difficult situation and made it worse by how he handled it."

Lab officials didn't audit Brown's other cases for problems after his resignation because his previous track record was "excellent," Logan said. They did write a policy requiring staff to keep all draft reports.

"I believe we have an excellent record in disclosing as much as we believe will be relevant," Logan said.

After Barfield was convicted of rape and burglary, however, the court fined the state $5,000 for failing to disclose memos revealing Brown had been suspended during the trial.

"A fine was just an inadequate response to that," Adraktas said. "If that's all an agency will suffer as a result of withholding information in a serious case, what will prevent them from doing it again?"

The crime labs' habit of destroying erroneous draft reports was "chilling" and raises the possibility of wrongful convictions, she said.

Andraktas also questions why the agency waited two years to investigate Brown's conduct, even promoting him. She said she submitted a transcript of Brown's false statements to the State Patrol's legal counsel soon after the interview.

Logan said he didn't know about Brown's dishonesty until the trial, and isn't sure if anyone else did. Officials did know he'd destroyed the draft report, which wasn't against policy at the time. Logan said they took action as soon as Brown testified to lying.

Today, Brown in part blames what happened on the stress of dealing with defense attorneys -- something police agencies discount, because employees are expected to "handle this stuff."

"We were facing on a monthly basis people who were trying to destroy our reputations," Brown said. "There was no acceptance of that."

Scientist falsified his report

From the earliest days of the state system, crime lab officials have floundered at reining in problem employees.

One glaring example is Donald K. Phillips, a forensic scientist hired in 1971 after a brief stint in the Seattle Police Department lab.

Phillips' skills were soon called into question, but those concerns had little effect on what would be a 15-year career with the State Patrol.

"They let him through probation even though they knew he was a problem," recalled Kay Sweeney, a former crime lab quality assurance manager for the State Patrol. "Once you passed probation, it's very hard to be terminated."

In August 1973, Phillips failed an 11-month trial run as a supervisor. His job evaluation, while praising his loyalty, cited poor communication with fellow employees and "an inability to properly perceive the necessary approach" to casework. It recommended he not be put in charge of cases.

Over the next two years, Phillips was promoted twice. By 1977, he was regularly collecting evidence at major crime scenes. Four years later, he was supervising homicide and rape crime-scene investigations.

It became clear in the mid-'80s that Phillips had misrepresented his credentials. On the witness stand, he'd testified more than once to having a chemistry major. In reality, he had majored in agricultural science at Ohio State University.

"I just didn't tell them what kind of chemistry," Phillips said in a recent interview.

In April 1985, lab officials fired Phillips for misconduct after he frightened a hotel maid by showing her gruesome crime scene photos in his room while out of town for a trial. The maid told police she feared he might be the Green River Killer.

Phillips said he was really fired for filing too much overtime. Eight months later, he won an appeal and was reinstated. Lab officials at first restricted him to drug cases.

Phillips said he was surprised when his boss, Sweeney, sent him to collect evidence at a Kitsap County crime scene on Sept.29, 1986. After reminding Phillips about proper procedures, Sweeney gave him the green light to search a garage where police believed 16-year-old Tracy Parker had been bludgeoned to death two weeks earlier. It would become a capital case, ultimately putting the killer -- Brian Keith Lord -- behind bars for life.

Police soon reported that Phillips had sprayed a claw hammer with too much of a chemical used to detect blood, preventing further testing.

Phillips denies doing anything wrong. "To this day, I believe there was enough blood to get a typing."

The real problem wasn't Phillips' mistake but his attempt to cover it up by denying he'd sprayed the hammer -- to the point of stating that in his lab report, according to Sweeney and State Patrol documents.

"He chose to falsify what he'd done. If he was going to do that to me, his supervisor, I couldn't trust him," Sweeney said.

When the State Patrol launched an internal investigation, Phillips resigned in December 1986.

"I still dream about it -- I loved the lab," said Phillips, 65, who moved to Oklahoma and started a business -- his own perennial greenhouse. "I thought I'd be there forever."

Despite Phillips' turbulent history, lab officials did not audit any of the thousands of cases he'd handled, or review his testimony in more than 50 cases.

Flaws on proficiency tests

Lab officials often point to proficiency tests as proof of forensic scientists' competence.

Crime lab workers must pass one test annually in each specialty to satisfy voluntary rules set by the American Society of Crime Laboratory Directors' Laboratory Accreditation Board. Staff know they're being tested, rather than having exams slipped in with regular casework.

Some say the system needs tightening.

Tacoma lab forensic scientist Charles Vaughan took a routine proficiency exam in September 1998, testing his ability to interpret footprint evidence.

When accreditation inspectors visited the Tacoma lab in September 1999, they couldn't find any record of Vaughan's exam.

It soon became apparent that Vaughan's supervisor, Terry McAdam, had never reviewed the test -- or realized that Vaughan failed to correctly match all of the footprints with the right shoe.

Vaughan was pulled off that type of casework for about six weeks until he could redo the test, plus pass another exam.

The same year Vaughan bungled his proficiency test, he mistakenly linked hairs found at a Thurston County burglary to a suspect, according to the suspect's attorney, Richard Woodrow.

Woodrow said he hired a private Seattle forensic scientist who concluded the hairs didn't match. The prosecutor dismissed the burglary charge in September 1998.

During the lab system's last accreditation, inspectors identified two other forensic scientists whose proficiency testing was not up to date. They also noted that technicians doing DNA work for the convicted felon databank had never taken a proficiency test, although that was not mandatory.

Since the last accreditation, several lab employees have made mistakes on proficiency tests, according to internal lab documents.

In the past year, a firearms examiner in Spokane and one in Seattle both flunked tests. The year before, a Seattle forensic scientist failed a shoeprint exam.

When employees fail a test, they're taken off casework until they can pass another exam. If problems persist, a supervisor monitors their work or puts them on a work-improvement plan.

"The work is being done by human beings and human beings sometimes make mistakes," Logan said.

That doesn't reassure critics who say proficiency testing is already too easy.

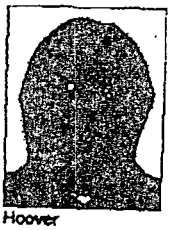
"It's such a hokey test," said Dan Krane, a biology professor at Wright State University in Ohio who runs a forensic consulting firm. "They all do it at the same time and use pristine samples which aren't anything like casework."

What Phillips said happened in the early 1980s was even worse.

"Everybody would put their heads together and get the right answers," he recalled. "We wanted to be right."

Drug analyst under surveillance

The chemist's odd behavior raised co-workers' suspicions as far back as 1998. Yet two years would pass before the State Patrol intervened.

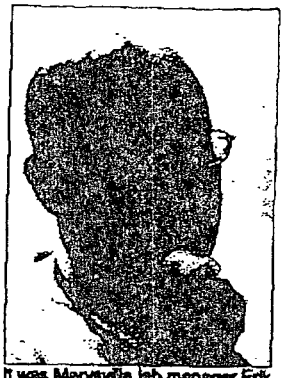

Hoover

After starting work at the Marysville lab in April 1997, James Boaz noticed that his colleague, Michael Hoover, handled an inordinate number of heroin cases. Sometimes Hoover even took over Boaz's cases without permission.

Boaz began locking up his files in his drawer when he wasn't at his desk. He also heard "loud snorting" coming from Hoover's desk, Boaz would later tell State Patrol investigators.

Chemist David Northrop said he first noticed problems in 1999 when Hoover posted a note soliciting heroin cases from the intake clerks. Northrop complained to his boss, Erik Neilson. By summer 2000, Boaz and Northrop reported that Hoover was secretive when handling heroin cases and assigned himself too many. They suspected he was making up results.

When Neilson confronted Hoover in September 2000, the 11-year employee claimed he was stashing heroin for police to use in training drug-sniffing dogs. Neilson warned him to stop.


It was Marysville lab manager Erik Neilson, above, who told the State Patrol that Hoover might be stealing heroin from evidence.

Two months later, Boaz and Northrop reiterated their suspicions and Neilson contacted the State Patrol to report that Hoover might be stealing heroin from evidence.

The State Patrol immediately launched an internal investigation, installed a hidden video camera above Hoover's desk and later questioned him.

Hoover confessed, saying he sniffed heroin in the lab to ease chronic back pain.

"I don't want anything bad to reflect on the State Patrol," Hoover told investigators on Dec. 22, 2000. "I found that if I sniff a little bit of ... heroin once in a while, it makes the pain go away where I can sleep at night."

Snohomish County prosecutors charged him with one count of tampering with evidence and one count of official misconduct, both misdemeanors. Felony charges weren't filed because no heroin was found in Hoover's possession.

Hoover resigned, pleaded guilty to the charges and received an 11-month jail sentence in November 2001. The scandal led to the dismissal of hundreds of pending drug cases in Snohomish, Island, Skagit, Whatcom, Jefferson and Clallam counties. The state Court of Appeals also overturned convictions in two drug cases because Hoover had tested the evidence.

"He stands by his test results," said Hoover's former attorney, Stephen Garvey. "I suspect juries would have still convicted."

The State Patrol did its best to minimize the damage, emphasizing that "the system worked" because lab employees turned Hoover in.

Asked about the delay in investigating Hoover's suspicious behavior, Logan said he and others have thought long and hard about what might have led to earlier detection and are now more likely to see the red flags: "They were seeing these things and they never wanted to put two and two together about someone who was a colleague and a friend."

Official concedes safeguards lax

The State Patrol lab relies on peer review as its primary safeguard for catching mistakes. Lab notes and reports for every case must be reviewed by at least one other forensic scientist before being released.

While effective to a point, peer review has its limits.

Interpersonal conflicts get played out during reviews. Overloaded scientists do only cursory looks. Errors are missed due to inexperience.

A troubling breakdown in that system came to light during an internal audit of the work of Spokane forensic scientist Arnold Melnikoff.

Lab officials decided to review his work after Melnikoff was accused of helping wrongfully convict a Montana man of rape based on erroneous hair-analysis work he did for that state's lab in the 1980s.

The April 2003 audit examined 100 of Melnikoff's felony drug cases dating back four years and found troubling flaws in 30, ranging from insufficient data to identify substances to mistakes in documentation. The report described Melnikoff's drug-analysis work as "sloppy" and "built around speed and short-cuts."


Melnikoff

Melnikoff, who had been on paid leave since November 2002, contested every finding in the audit. In a written rebuttal, he wrote that he'd never failed a proficiency test or had a negative performance review in his 14-year employment.

And he pointed out that every drug case he'd analyzed had passed peer review: "If there was a 'problem,' it was a statewide laboratory problem," Melnikoff wrote.

The State Patrol fired Melnikoff in March, saying his 1990 testimony in a Montana rape trial had undermined his credibility. Melnikoff is appealing his firing.

Logan conceded that Melnikoff's case revealed employees had become lax about peer review, especially when dealing with a difficult co-worker. "The people doing peer review were only taking him on on the major errors," said Logan, who now requires supervisors to do spot checks as well.

What's really needed is more rigorous science, said Edward Blake, a California forensic scientist whose work has helped free dozens of wrongly convicted prisoners.

"This is an operation like 'I'm OK, you're OK,' " Blake said.

Lab workers violate conduct code

Moral integrity and honesty are key qualities for crime lab employees whose work will help convict or exonerate suspects.

Job applicants take lie-detector tests that include questions about illegal drug use. One- third of applicants are disqualified because they've smoked marijuana in the previous three years.

Once hired, crime lab scientists are supposed to follow the State Patrol's code of conduct. But over the last five years, 25 of them have been disciplined for violating those rules. Complaints included everything from arguing with co-workers or leaving a loaded rifle propped against a workbench to lying about travel and releasing confidential documents to a family member.

One-third of the scientists received a written reprimand. Others were suspended briefly or counseled. Seven were fired, although one of them won back his job.

Timothy Nishimura, then manager of the Marysville lab, was fired in September 2000 for misconduct, including sexual harassment of female employees dating back to 1991, according to State Patrol documents.

Nishimura appealed his firing, and was reinstated with back pay in March 2002. He was demoted to a document-examiner job in the Seattle lab. He refused comment for this story.

In another case, Kevin Fortney, supervisor in the Spokane lab, was investigated in December 2000 for cruising Internet porn sites at work. Fortney admitted his behavior and was suspended for two days. He has since been promoted to manager of that lab. Fortney didn't respond to requests for comment.

Crime labs seem hard-pressed to find scientists who are not only well-educated but can analyze complex cases, said Blake, the California expert. "Just because they can extract DNA doesn't mean they can think through problems," he said.

The most common problem isn't testing errors but incorrect interpretation of the data, said Ray Grimsbo, a Portland forensic scientist who runs a private lab.

"It's what they do with the results that gets them into trouble," said Grimsbo, attributing that to lack of experience or arrogance.

Pushing evidence too far is what some critics say happened when former Seattle crime lab manager Mike Grubb testified in a Vancouver, Wash., murder case.

Grubb told the court an earprint found at the scene in 1994 likely belonged to the accused, David Kunze. An expert from the Netherlands went further, testifying that the earprint was definitely left by Kunze's left ear.

The earprint evidence convinced a jury, who convicted Kunze in July 1997 of aggravated murder in the beating death of his ex-wife's fiancé. Kunze was sentenced to life in prison.

Two years later, the Court of Appeals overturned Kunze's conviction, criticizing the earprint testimony as "not generally accepted as reliable in the relevant scientific community."

"It was junk science," said John Henry Browne, Kunze's attorney. Kunze was set free in 2001 after a second trial ended in a mistrial.

It wasn't the first time an appeals court had taken issue with Grubb's conclusions. His testimony in a 1994 rape-murder trial, in which he claimed he could determine the age of semen found in the body of the teenage victim, was criticized as scientifically unsound.

Grubb stands behind his conclusions in both cases, saying he based his findings on years of experience and forensic studies.

"My testimony was well within the bounds of reasonableness," said Grubb, who left the lab in 1998 to run the San Diego Police Department crime lab.

Experts say reforms needed

Some critics believe a host of reforms are needed, including weeding out incompetent or dishonest crime lab employees, and requiring more rigorous outside reviews.

Washington's crime labs are inspected once every five years to retain voluntary accreditation. During the last review, in September 1999, all of the labs initially fell short of meeting key standards, records show.

Inspectors cited problems ranging from proficiency tests that weren't up to date to an unlocked evidence freezer. Those problems were soon corrected.

Said Logan: "They didn't come up with anything that they felt was a problem with the quality of the work."

Failing to meet voluntary standards, however, is a red flag because accreditation is done by former crime lab insiders who set the bar low, experts say.

"It's an old boys' network," said William C. Thompson, a criminology and law professor at the University of California-Irvine. "It's the absolute bare bones that's needed to run a lab. It isn't the best scientific work that can be done."

"The labs have manufactured credentials for themselves," said Blake, who won't accredit his California lab. "If you have people who are willing to manufacture credentials, what else are they making up?"

Unlike most critics, Frederick Whitehurst has been on the other side.

Whitehurst, an attorney and former FBI explosives expert, went public in 1995 about flaws in that lab.

He now heads the non-profit Forensic Justice Project.

While he favors requiring the nation's crime labs to undergo independent audits, he also remembers what it was like to have a two-year backlog of cases on his desk.

He hasn't forgotten the frustration of trying to do his best in the face of unrelenting demand.

"They can't go back and check. There's no time, there's no money," he said. "... And they will fall to the pressures."

P-I reporter Ruth Teichroeb can be reached at 206-448-8175 or ruthteichroeb@seattlepi.com

WACDL

Washington Association of
Criminal Defense Lawyers

Kevin J. Curtis
President

Teresa Mathis
Executive Director

October 16, 2007
Contact: Teresa Mathis
WACDL, 206-623-1302

State Forensics Council Asked to Investigate Crime Lab

Leaders of a statewide legal organization today asked the state's Forensic Investigations Council to investigate alleged negligence or misconduct by the Washington State Patrol's crime laboratory system. The request comes in the wake of several incidents that point to systematic problems in the operations of the state's forensics lab.

"We want to ensure that innocent people are not imprisoned, and that people who have committed crimes are brought to justice. Accurate forensic work is essential to the fair administration of the law," said Bill Bowman, president-elect of the Washington State Association of Criminal Defense Lawyers (WACDL).

In a letter to the Forensics Investigations Council, Bowman and current WACDL president Kevin Curtis urged it to examine problems stemming from several serious allegations about crime laboratory operations that have come to light:

- that toxicology lab manager Ann Marie Gordon gave assurances that she had tested quality assurance solutions used for breath testing when in fact she had not conducted such testing;
- that recordkeeping and data analysis was severely deficient during Gordon's tenure (Gordon resigned on July 20, 2007, after allegations of misconduct were made public); and
- that ballistics analyst Evan Thompson provided misleading and unfounded testimony in an unknown number of cases;

The Forensic Investigations Council is responsible for looking into allegations of serious negligence or misconduct in forensic work relating to crimes. WACDL leaders requested that the council investigate and issue a public report on the causes of the alleged problems; make recommendations for corrective actions, including changes in crime laboratory protocols; and evaluate the effectiveness and completeness of any internal investigations conducted by the State Patrol.

"The public became aware of deficiencies in the forensic lab only because a whistleblower came forward. An independent body needs to look into the situation, so that we can minimize the possibility of forensic investigation errors in the future," said Kevin Curtis.

The Washington Association of Criminal Defense Lawyers was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system.

--END--

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Test Anxiety

Scandal at the state's DUI lab has defendants lathered

By Bob Geballe

The state's toxicology lab has a headache worthy of a three-day binge.

It all started when Ann Marie Gordon, manager of the laboratory—whose purpose is to provide the technological clout behind the state's DUI laws—got caught falsifying verifications of breath-test equipment.

"I call it 'Ann Marie Gordon and the Temple of Perjury,'" says Kenneth Fornabai, an Auburn lawyer and president of the Washington Foundation for Criminal Justice, an organization of DUI lawyers. "It represents a departure from integrity so profound that you can't believe anything about the lab."

MARTINA TOUCH PHOTOGRAPHY

The state lab has lost all credibility, according to Kenneth Fornabai.

The Washington Association of Criminal Defense Lawyers sent a letter to the state Forensics Council asking for an investigation into the conduct of the entire State Patrol toxicology and criminal laboratory program, and saying that negligence or misconduct at the labs "has substantially affected the integrity of forensics results in Washington state."

Gordon resigned last summer after a whistleblower in the lab reported that she was signing certificates saying she had calibrated breath-testing units for use in the field when she actually hadn't performed the calibrations. In fact, someone else in the lab had run the tests. The whistleblower told the State Patrol about the situation in March 2007. However, it took two months for the State Patrol to acknowledge the problem publicly, announcing it was withdrawing all the certifications done by Gordon.

It was a shocking revelation for attorneys involved in DUI defense, who say it calls into question the outcome of perhaps thousands of cases.

"We heard about it in June, when the State Patrol Web site said they were pulling all the certifications for breath-test units," says Fornabai. The accuracy of breath tests is crucial, he says, because miniscule differences in measured blood-alcohol levels can have large legal consequences. "If it's a first offense and your blood alcohol is over 0.15, there are more severe penalties than under 0.15. For example, right now, I have a client whose blood alcohol was measured at 0.151."

The repercussions are rippling across the state. The state Department of Licensing reinstated licenses for nearly 40 people arrested on suspicion of drunk driving, then decided the courts were better prepared to handle the remaining onslaught of cases. Defense attorneys in DUI cases are asking for the dismissals of cases, or the suppression of breath- and blood-test data. And several counties have been conducting hearings to decide how to handle the contested cases.

Several judges in King County threw out breath tests in their courtrooms and said they wouldn't accept any readings again until the state improves the lab's procedures. The Snohomish County District Court also suppressed about 40 breath tests. In Skagit County, judges refused to dismiss 51 DUI

Trouble in the East

While the entire state is dealing with the fallout from botched breath-test certifications, Spokane County has an additional issue, also involving DUI cases. Attorney Breean Beggs with the Center for Justice in Spokane helped two defendants get their convictions overturned because they were arrested within Spokane city limits but tried by a district judge. The city and county had an agreement that let district court judges—who are elected countywide—preside in Spokane's municipal court. But Beggs pointed out that state law says judges who hear municipal cases must be elected only by city residents.

The state Court of Appeals Division III agreed in November with Beggs, and the ruling threatens to upend a decade of litigation involving thousands of cases—traffic violations, DUIs, domestic violence, shoplifting—decided by the Spokane Municipal Court. The case now goes before the state Supreme Court. If it stands, dealing with the enormous volume of potential conviction reversals could have "unimaginable" effects lasting for years, Superior Court Judge Sam Cozza said in a *Spokesman-Review* article.

—*Bob Geballe*

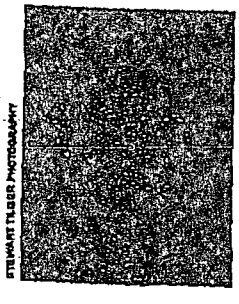
"It represents a departure from integrity so profound that you can't believe anything about the lab."
—Auburn attorney Kenneth Fornabai

cases but castigated the lab and its director, Dr. Barry Logan.

The uproar doesn't end with the falsified documents. Defense attorneys are unhappy that King County Prosecutor Dan Satterberg has declined to prosecute Gordon. Gordon, who resigned on July 20, acknowledged that she signed certificates for tests she hadn't run, according to documents released by the State Patrol. She could have faced legal sanctions, but a statement released by Satterberg's office said there was "little to be accomplished by any criminal prosecution" because "the public has not suffered any harm."

The breath-test issue comes on top of several other instances of questionable performance at state crime labs. In April, State Patrol forensic scientist Evan Thompson resigned over questions of poor documentation. Thompson had provided crucial testimony in more than 1,000 cases since 1999.

That's not all. Francisco Duarte, also with Fox Bowman Duarte, was the lead attorney for Fred Russell, convicted in a drunk-driving accident in Eastern Washington that resulted in the deaths of three college students. During that trial, it came to light that vials containing blood from Russell were



STEWART TILGER PHOTOGRAPHY

Jon Fox thinks prosecutors are letting the lab manager off too easy.

Not so, says Jon Fox, with Fox Bowman Duarte's Bellevue office. "The prosecuting attorneys are understating this because of the magnitude of the problem," he says. "Allowing the prosecutor to make this decision is a conflict of interest. But it's clear to us that it's an incredible injustice. The charging

destroyed at the lab before the trial. "There was complete disregard of proper handling of blood tests," Duarte says.

Gordon, who was in charge of the vials, resigned before testifying at the trial.

As these cases work their way through various courts, the fall-

American Board of
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July 23, 2007

Barry K. Logan, Ph.D., D-ABFT
Washington State Patrol
Forensic Laboratory Services Bureau
2203 Airport Way South, Suite 360
Seattle, Washington 98134-2027

Dear Dr. Logan: **Review of May 10/11, 2007 Inspection Report**

Our review of the report of your recent inspection is complete. While the report reflects largely satisfactory performance, three issues were raised that require your attention prior to reaccreditation being granted.

E-17 (E) was answered "no", with the comment that the laboratory director (Dr. Logan) does not directly sign off on proficiency test reports "in real time". The PT result forms should be reviewed and signed by the laboratory director shortly after receipt. It is recognized that QA staff prepare summary reports for periodic review by Dr. Logan. However, there were one or two instances that arose during the previous mid-cycle review that indicated not all PT deficiencies were being addressed with corrective action in a timely manner. *Please indicate the actions that have been or will be, taken to address these concerns.*

G-7 (E) was answered "yes", but with a comment that the current guidelines in the SOP do not always make it clear what the criteria were for deciding, for quantitative GC/MS/NP assays, which calibration should be accepted, or how to proceed if both curves meet acceptability but the quantitative values from each differ significantly (e.g. by more than x% from each other). It was also felt that guidance should be given on action to be taken when the intercept of the graph deviated substantially from the origin. The inspection team did note that overall, the quality of data was good, but that additional guidance would help both the less experienced analysts, and the forensic defensibility of the work. *Please indicate the actions that have been or will be, taken to address these concerns.*

G-15 (E) was answered "no". The main concern was that, in postmortem cases, some unconfirmed EMIT cannabinoid results were reported "pos" on the final report without an appropriate comment. We understand that this has been addressed by addition of a comment near the bottom of the report. *Please confirm that the comment is used now and provide an example (if not already sent).*

Please address the first two items within 60 days of receipt of this letter. Do not hesitate to contact me if you have any questions, or if you feel we have misunderstood any of the issues raised. Evidence of corrective action should be sent directly to me.

I will forward a copy of the inspection report separately. You are encouraged to address the "non-essential" deficiencies. Thank you for your interest in the ABFT Accreditation Program.

Graham R. Jones, Ph.D., DABFT
Chair, ABFT Accreditation Committee

STATE OF WASHINGTON
WASHINGTON STATE PATROL
FORENSIC LABORATORY SERVICES BUREAU
2203 Airport Way South, Suite 360 • Seattle, Washington 98134-2027 • (206) 262-6000 • FAX (206) 262-6018

July 26, 2007

Graham R. Jones, Ph.D., DABFT
Chair, ABFT Accreditation Committee
c/o Office of the Chief Medical Examiner
7007 - 116 Street,
Edmonton, Alberta
Canada T6H 5R8

Dear Dr. Jones:

This is to follow up on our telephone conversation of July 20, 2007, in which I notified you that Ann Marie Gordon had resigned her position as Toxicology Laboratory Manager. I informed you that Ms. Gordon had resigned and there was an ongoing investigation into her certification of breath alcohol simulator solutions. We discussed that the simulator solution process was outside of the scope of accreditation by ABFT, and not an accreditation issue.

Ms. Gordon played a major role in the Laboratory as manager and was the principal signatory on many of the case reports issued. Until her position is filled, these reports will be signed by me, Jayne Thatcher, and by designated supervisors.

Please let me know if ABFT needs any further information at this time.

I am in receipt of your inspection follow up letter and will respond within the 60 day window.

Sincerely,

Barry K. Logan, Ph.D., DABFT
Washington State Toxicologist

BKL:kj

Simpson, Melissa (WSP)

From: Logan, Barry (WSP)
Sent: Sunday, August 19, 2007 12:14 PM
To: Simpson, Melissa (WSP)
Subject: FW: ABFT
Importance: High

From: Sorenson, Don (WSP)
Sent: Friday, August 17, 2007 1:38 PM
To: Logan, Barry (WSP)
Cc: Jones, Kevin (WSP); Graham Jones (Graham.Jones@gov.ab.ca); Beckley, Paul (WSP); Batiste, John (WSP)
Subject: RE: ABFT
Importance: High

Barry,
At your request, Dr. Jones and I discussed the matter this afternoon and agree that this audit will provide value to the FSLB and be welcomed by our stakeholders. Anticipated dates for fieldwork are October 25-26, 2007. Will you be handling the contracting process? Also, please let me know how you envision RMD's additional involvement so that I can plan accordingly. Thanks!
Don

From: Logan, Barry (WSP)
Sent: Thursday, August 16, 2007 9:03 AM
To: Sorenson, Don (WSP)
Cc: Jones, Kevin (WSP); Graham Jones (Graham.Jones@gov.ab.ca); Beckley, Paul (WSP)
Subject: ABFT

Don; Here are some updates.

I have been keeping ABFT (our accrediting board) notified about what's going on in the Tox Lab. Their accreditation program does not cover the simulator solution aspects of the lab's activities, only the blood and tissue testing. However, in the interests of openness, and since AMG was signing our reports, I've discussed inviting them in to do a data audit of cases that Ann signed out, to verify the completeness of the review. They are willing to do that, but probably not until October.

We already had an inspection in June where the lab data was reviewed and no problems with the quality of the review were identified. But this would provide additional reassurance to our customers and the public.

Could you please contact Dr. Graham Jones (780) 427-4987 who chairs the laboratory accreditation program at ABFT to discuss this further?

Thanks

BKL

(Graham; Don Sorenson heads our agency's risk management division.)

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Barry K Logan PhD, DABFT
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Simpson, Melissa (WSP)

From: Logan, Barry (WSP)
Sent: Sunday, August 19, 2007 12:14 PM
To: Simpson, Melissa (WSP)
Subject: FW: ABFT response

From: Graham Jones [mailto:Graham.Jones@gov.ab.ca]
Sent: Monday, August 13, 2007 4:44 PM
To: Logan, Barry (WSP)
Subject: RE: ABFT response

Barry:

If you get a chance, can you give me call sometime morrow (Tuesday)? The ABFT Executive is having a brief conference call Wednesday afternoon to discuss how to respond to the lawyers that have asked for information (I think Yale copied you on their request). However, I mainly wanted to chat briefly to you about what, if any investigation the WSP will be made into Ann Marie's conduct in the lab. My concern is not specifically with the breath alcohol program (which is currently not within the scope of the ABFT accreditation), but whether there are broader issues we (i.e. ABFT) should be concerned with. These comments are made from a "global" perspective and do not reflect any specific concerns I/we have.

I should be in soon after 7.30 Pacific time. Our switchboard is open until 3.30 pm (PST), although I can arrange to take a call later if necessary.

Thanks Barry,

Graham

Graham R. Jones, Ph.D.
Chief Toxicologist
Office of the Chief Medical Examiner
7007 - 116 Street NW
Edmonton, Alberta
Canada T6H 5R8
Phone: (780) 427-4987
Fax: (780) 422-1265

From: Barry.Logan@wsp.wa.gov [mailto:Barry.Logan@wsp.wa.gov]
Sent: Monday, August 13, 2007 4:45 PM
To: Graham Jones
Subject: ABFT response

Graham; Can you give me your own take on the attached draft which is attempting to address the issue of which quantitative results to report when we have several. If it looks like we're on track, I have some more editing to do but are close to submitting a formal response. If I'm not addressing the issue you were raising let me know.

Thanks much

BKL

I. Quantitative Results Reporting

1. Many drugs are quantified during initial drug screening by GCMS/NPD, and then again during confirmation/quantitation by special methods (GCMS-SIM, LCMS, LCMSQQQ, for various drugs including methamphetamine, benzodiazepines, fentanyl, cocaine and metabolites and opiates). This may result in several quantitative results for a given drug which are reportable (i.e. calibration acceptable, controls accepted, etc).

2. In any event, the result reported from any assay shall have met the individual assay requirements for chromatography, ion ratio, spectral comparison, linearity, linear range, and control performance, and shall be subject to the established limits of detection and limits of quantitation for that assay.

3. Subject to the above requirements, the analyst shall make the determination regarding which quantitative result to report, based on the following considerations.

a. The calibration curve fit (R2 value) should be greater than 0.990 for the reportable compound. Curves with higher R2 values are generally preferable.

b. An assay with a curve which goes closer to the origin may be preferred over one with substantial deviation, subject to the additional considerations listed in this section.

c. Linear calibration curves are preferred over quadratic curves. However, some compounds have calibration curves that are non-linear and it is acceptable to report compounds from a quadratic calibration curve. However, if a quadratic calibration curve is used, the reported value should quantitate within the range of the acceptable calibrators, and the upper calibrator serves as the limit of quantitation.

d. If a calibrator is dropped in the same concentration range as the compound in a case, it is preferable to use one of the other available methods to quantitate the sample.

e. Chromatography (including: signal-to-noise ratios, co-eluting compounds, instrument performance, and method limitations) should be considered when evaluating methods.

f. An analyst may preferentially select a method in which they performed the testing, over a method in which a peer performed testing when the quality of both tests is similar. This facilitates testimony by requiring only one analyst in court.

g. In some instances, it may be preferable to select a method with a lower limit of detection (LOD) and/or quantitation (LOQ), even if the linearity is poorer, in order that a compound can be reported quantitatively.

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e-mail.

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Date: Feb. 18, 2009
Contacts: Sara Frueh, Media Relations Officer
Luwam Yeibio, Media Relations Assistant
Office of News and Public Information
202-334-2138; e-mail <news@nas.edu>

FOR IMMEDIATE RELEASE

BADLY FRAGMENTED' FORENSIC SCIENCE SYSTEM NEEDS OVERHAUL; EVIDENCE TO SUPPORT RELIABILITY OF MANY TECHNIQUES IS LACKING

WASHINGTON – A congressionally mandated report from the National Research Council finds serious deficiencies in the nation's forensic science system and calls for major reforms and new research. Rigorous and mandatory certification programs for forensic scientists are currently lacking, the report says, as are strong standards and protocols for analyzing and reporting on evidence. And there is a dearth of peer-reviewed, published studies establishing the scientific bases and reliability of many forensic methods. Moreover, many forensic science labs are underfunded, understaffed, and have no effective oversight.

Forensic evidence is often offered in criminal prosecutions and civil litigation to support conclusions about individualization – in other words, to "match" a piece of evidence to a particular person, weapon, or other source. But with the exception of nuclear DNA analysis, the report says, no forensic method has been rigorously shown able to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source. Non-DNA forensic disciplines have important roles, but many need substantial research to validate basic premises and techniques, assess limitations, and discern the sources and magnitude of error, said the committee that wrote the report. Even methods that are too imprecise to identify a specific individual can provide valuable information and help narrow the range of possible suspects or sources.

Reliable forensic evidence increases the ability of law enforcement officials to identify those who commit crimes, and it protects innocent people from being convicted of crimes they didn't commit," said committee co-chair Harry T. Edwards, senior circuit judge and chief judge emeritus of the U.S. Court of Appeals for the District of Columbia Circuit. "Because it is clear that judicial review alone will not cure the infirmities of the forensic science community, there is a tremendous need for the forensic science community to improve."

Strong leadership is needed to adopt and promote an aggressive, long-term agenda to strengthen forensic science, the report says. To achieve this end, the report strongly urges Congress to establish a new, independent National Institute of Forensic Science to lead research efforts, establish and enforce standards for forensic science professionals and laboratories, and oversee education standards. "Much research is needed not only to evaluate the reliability and accuracy of current forensic methods but also to innovate and develop them further," said committee co-chair Constantine Gatsonis, professor of biostatistics and director of the Center for Statistical Sciences at Brown University. "An organized and well-supported research enterprise is a key requirement for carrying this out."

To ensure the efficacy of the work done by forensic scientists and other practitioners in the field, public forensic science laboratories should be made independent from or autonomous within police departments and prosecutors' offices, the report says. This would allow labs to set their own budget priorities and resolve any cultural pressures caused by the differing missions of forensic science labs and law enforcement agencies.

The report offers no judgment about past convictions or pending cases, and it offers no view as to whether the courts should reassess cases that already have been tried. Rather, the report describes and analyzes the current situation in the forensic science community and makes recommendations for the future.

CERTIFICATION AND ACCREDITATION SHOULD BE MANDATORY

Many professionals in the forensic science community and the medical examiner system have worked for years to achieve excellence

their fields, aiming to follow high ethical norms, develop sound professional standards, and ensure accurate results in their practice. But there are great disparities among existing forensic science operations in federal, state, and local law enforcement agencies. The disparities appear in funding, access to analytical instruments, and availability of skilled and well-trained personnel; and in certification, accreditation, and oversight. This has left the forensic science system fragmented and the quality of practice uneven. Except in a few states, forensic laboratories are not required to meet high standards for quality assurance, nor are practitioners required to be certified. These shortcomings pose a threat to the quality and credibility of forensic science practice and its service to the justice system, concluded the committee.

Certification should be mandatory for forensic science professionals, the report says. Among the steps required for certification should be written examinations, supervised practice, proficiency testing, and adherence to a code of ethics. Accreditation for laboratories should be required as well. Labs should establish quality-control procedures designed to ensure that best practices are followed, confirm the continued validity and reliability of procedures, and identify mistakes, fraud, and bias, the report says.

Setting standards for certification and accreditation should be one of the responsibilities of the new National Institute of Forensic Science recommended in the report. The institute should work with the National Institute of Standards and Technology, government and private labs, Scientific Working Groups, and other partners to develop protocols and best practices for forensic analysis, which should inform the standards.

Existing data suggest that forensic laboratories are underfunded and understaffed, which contributes to case backlogs and makes it hard for laboratories to do as much as they could to inform investigations and avoid errors, the report says. Additional resources will be necessary to create a high-quality, self-correcting forensic science system.

EVIDENCE BASE OFTEN SPARSE, VARIES AMONG DISCIPLINES

Nuclear DNA analysis has been subjected to more scrutiny than any other forensic discipline, with extensive experimentation and validation performed prior to its use in investigations. This is not the case with most other forensic science methods, which have evolved piecemeal in response to law enforcement needs, and which have never been strongly supported by federal research or closely scrutinized by the scientific community.

As a result, there has been little rigorous research to investigate how accurately and reliably many forensic science disciplines can do what they purport to be able to do. In terms of a scientific basis, the disciplines based on biological or chemical analysis, such as toxicology and fiber analysis, generally hold an edge over fields based on subjective interpretation by experts, such as fingerprint and toolmark analysis. And there are variations within the latter group; for example, there is more available research and protocols for fingerprint analysis than for bitemarks.

Nuclear DNA analysis enjoys a pre-eminent position not only because the chances of a false positive are minuscule, but also because the likelihood of such errors is quantifiable, the report notes. Studies have been conducted on the amount of genetic variation among individuals, so an examiner can state in numerical terms the chances that a declared match is wrong. In contrast, for many other forensic disciplines -- such as fingerprint and toolmark analysis -- no studies have been conducted of large populations to determine how many sources might share the same or similar features. For every forensic science method, results should indicate the level of uncertainty in the measurements made, and studies should be conducted that enable these values to be estimated, the report says.

There is some evidence that fingerprints are unique to each person, and it is plausible that careful analysis could accurately discern whether two prints have a common source, the report says. However, claims that these analyses have zero-error rates are not plausible; uniqueness does not guarantee that two individuals' prints are always sufficiently different that they could not be confused, for example. Studies should accumulate data on how much a person's fingerprints vary from impression to impression, as well as the degree to which fingerprints vary across a population. With this kind of research, examiners could begin to attach confidence limits to conclusions about whether a print is linked to a particular person.

Disciplines that are too imprecise to identify an individual may still be able to provide accurate and useful information to help narrow the pool of possible suspects, weapons, or other sources, the report says. For example, the committee found no evidence that microscopic hair analysis can reliably associate a hair with a specific individual, but noted that the technique may provide information that either includes or excludes a subpopulation.

In addition to investigating the limits of the techniques themselves, studies should also examine sources and rates of human error, the report says. As part of this effort, more research should be done on "contextual bias," which occurs when the results of forensic analysis are influenced by an examiner's knowledge about the suspect's background or an investigator's knowledge of a case. One study found that fingerprint examiners did not always agree even with their own past conclusions when the same evidence was presented in a different context.

COURT TESTIMONY SHOULD BE GROUNDED IN SCIENCE, ACKNOWLEDGE UNCERTAINTIES

The committee was not asked to determine whether analysis from particular forensic science methods should be admissible in court,

nd did not do so. However, it concluded that the courts cannot cure the ills of the forensic science community. "The partisan dversarial system used in the courts to determine the admissibility of forensic science evidence is often inadequate to the task," said dwards. "And because the judicial system embodies a case-by-case adjudicatory approach, the courts are not well-suited to ddress the systemic problems in many of the forensic science disciplines."

he committee also concluded that two criteria should guide the law's admission of and reliance upon forensic evidence in criminal ials: the extent to which the forensic science discipline is founded on a reliable scientific methodology that lets it accurately analyze vidence and report findings; and the extent to which the discipline relies on human interpretation that could be tainted by error, bias, r the absence of sound procedures and performance standards.

he report points out the critical need to standardize and clarify the terms used by forensic science experts who testify in court about ie results of investigations. The words commonly used – such as "match," "consistent with," and "cannot be excluded as the source f" – are not well-defined or used consistently, despite the great impact they have on how juries and judges perceive evidence.

addition, any testimony stemming from forensic science laboratory reports must clearly describe the limits of the analysis; currently, ilure to acknowledge uncertainty in findings is common. The simple reality is that interpretation of forensic evidence is not infallible - quite the contrary, said the committee. Exonerations from DNA testing have shown the potential danger of giving undue weight to vidence and testimony derived from imperfect testing and analysis.

TRONG, INDEPENDENT LEADERSHIP NEEDED

he existing forensic science enterprise lacks the necessary governance structure to move beyond its weaknesses, the report says. he recommended new National Institute of Forensic Science could take on its tasks in a manner that is as objective and free of bias s possible – one with the authority and resources to implement a fresh agenda designed to address the problems found by the ommittee. The institute should have a full-time administrator and an advisory board with expertise in research and education, the rensic science disciplines, physical and life sciences, and measurements and standards, among other fields.

he committee carefully considered whether such a governing body could be established within an existing agency, and determined at it could not. There is little doubt that some existing federal entities are too wedded to the current forensic science community, hich is deficient in too many respects. And existing agencies have failed to pursue a strong research agenda to confirm the videntiary reliability of methodologies used in a number of forensic science disciplines.

ne report was sponsored by the National Institute of Justice at the request of Congress. The National Academy of Sciences, National cademy of Engineering, Institute of Medicine, and National Research Council make up the National Academies. They are private, nprofit institutions that provide science, technology, and health policy advice under a congressional charter. The Research Council i e principal operating agency of the National Academy of Sciences and the National Academy of Engineering. A committee roster llows.

pies of STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD are available from the National ademies Press; tel. 202-334-3313 or 1-800-624-6242 or on the Internet at HTTP://WWW.NAP.EDU. Reporters may obtain a copy m the Office of News and Public Information (contacts listed above). In addition, a podcast of the public briefing held to release this ort is available at HTTP://NATIONAL-ACADEMIES.ORG/PODCAST.

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his news release and report are available at HTTP://NATIONAL-ACADEMIES.ORG]

TIONAL RESEARCH COUNCIL
ision on Policy and Global Affairs
mmittee on Science, Technology, and Law

MMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY

RRY T. EDWARDS (CO-CHAIR)
ior Circuit Judge and Chief Judge Emeritus
. Court of Appeals for the District of Columbia Circuit
shington, D.C.

Guth, Dinah

To: Olson, Paula
Subject: RE: Retirement
Priority: High

I can attach this e-mail to his IOC indicating his intention to retire and just change the date. However, do we pay him through 5 p.m. on 7/31/00? He will be cashed out on his annual leave and entitled to 1/4 of his sick leave on VEBA.

Our regulation manual states an employee with five or more years of service will receive a laser plaque and a certificate for the spouse. Because the Tox Lab people came to us on 7/1/99, based on Legislative action, am I to order the plaques for Glenn or not?

From: Olson, Paula
To: Guth, Dinah
Subject: FW: Retirement
Date: Tuesday, August 01, 2000 8:57AM
Priority: High

Dinah: Please see the e-mail below. Do we need anything else from Glenn, or is this e-mail enough. Also, what needs to be done about leave, etc.? Thank you!

From: Logan, Barry
To: Olson, Paula (HRDPO)
Subject: FW: Retirement
Date: Monday, July 31, 2000 7:52PM

Paula; Glenn Case was involved in an argument with some coworkers last Friday. He behaved inappropriately responding angrily to a minor scheduling conflict. I counseled him on this and told him his response was unacceptable. He felt aggrieved but we parted amicably. He came in this morning and told his supervisor was he was retiring today, cleaned out his desk and left. Where do we go from here?

BKL

-----Original Message-----
From: OCasey8@aol.com [mailto:OCasey8@aol.com]
Sent: Monday, July 31, 2000 2:38 PM
To: blogan@wsp.wa.gov
Subject: RE: Retirement

Barry
I am retired. Could you tell Beth so I can cash out my vacation and sick leave.
Glenn

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

STATE OF WASHINGTON, Plaintiff,	)	
vs.	)	
Benson-Schreiber, Joseph	)	C603710
Blue, Katherine	)	C631027
Brocious, Lisa M.	)	C603895
Casey, Neil Andrew	)	C631155
Clark, Christopher L.	)	C603356
Farrington, Andrew	)	C551505
Green, Athena	)	CR10720
Histo, Lawrence W.	)	C603945
Kemp, Marvin	)	CR09974
Lehman, Brian	)	C506035
Luckman, Clinton C.	)	C631905
Lund, Robb R.	)	C631705
Manning, Lucas	)	C603747
Moore, Gerald	)	C631079
Ogg, Reece C.	)	C603988
Plummer, Debra	)	C603885
Rancourt, Allen	)	C631039
Randall, Thomas	)	C631563
Seaman, Melody	)	C551273 and C631901
Smith, John Henry III	)	C631043
Smith, Kevin	)	C631444
Temple, Paul Allen	)	C631037
Yeaman, Kyle	)	C631767
Defendants	)	

Court's Ruling Re:
BAC Motion

These matters having been heard in open court on March 31, 2008, argument presented by Ted Vosk, Attorney, on behalf of all defendants joined in the motion and Tim Higgs, Deputy Prosecutor on behalf of the State of Washington. Attorneys James Gazori, Bruce Finlay, Jeanette Boothe, Linda Callahan, Wade Samuelson, George Steele were also present for part or all of the hearing. Many defendants formally waived their presence.

The court having considered motions and briefs and exhibits filed by each party and transcripts and exhibits from State v. Ahmach, et al, King County District Court No. C0627921, et al; State v. Sharon K. Gilbert, Skagit County District Court, No. C00669127 and Eric Arntson v. State of Washington, Department of Licensing Hearing.

Rod Gullberg, the State's expert witness testified in these proceedings that he has a lack of confidence in breath tests which involved QAP (quality assurance procedure) and field solutions prior to and including solution number 07025 due to the various errors which have been testified to in several hearings, said transcripts having been incorporated into these proceedings by agreement of the parties. Rod Gullberg was a Sargent in the breath test section of the Washington State Patrol for over twenty years and more recently has served as a research analyst with the Washington State Patrol Breath Alcohol Test Section as a civilian employee.

Ordinarily, the court would agree with the State's position that wherein there is a dispute as to the accuracy of the breath test, the issue would be one for the jury to decide. However, the multiplicity of errors in reporting data, the flagrant falsification of certifications by the head of the breath test section (Ann Marie Gordon) and collusion by next in charge (Edward Formosa), errors in the computer program/software, errors in documentation, lack of documentation and various violations of the State Toxicologist's Protocols lead the court to the same conclusion that Rod Gullberg has arrived at. There is a lack of confidence in the accuracy in the breath tests involving QAP and Field solutions prior to solution number 07025. This does not mean that all test results are inherently suspect. It should also be noted that although the term "discarded data" has been used, there is no evidence that actual data or test results of the solutions in question were discarded or destroyed. The term "discarded data" refers to "outliers" or test results which were not utilized in calculating the mean (average) of test results. Further, there is no evidence that the underlying testing of the solutions, or the results thereof, were falsified or tampered with in any way.

Many of the errors result in a lower reading than the actual test would have been had the solutions been correct. The vast majority of the readings appear to be accurate on a state wide level. However, at this time, as to the cases pending before this court which have been joined for the motion heard on March 31, 2008, it is the court's conclusion that the evidence relating to the breath tests which are directly related to instruments utilizing QAP and or field solutions 07025 or lower are unreliable.

The court is not persuaded by the defense argument that the Washington State Toxicology Lab must comply with standards set by other agencies. There was significant discussion regarding the use of weighted mean vs. arithmetic mean in determining the average of the solutions and when to discard outlier results in calculations. The legislature empowered the Washington State

Toxicologist to make those determinations, not the courts and not other agencies.

In so far as it appears that each of the cases joined in this motion are impacted by the use of solutions 07025 or prior in either the QAP or the field solution, the breath test is suppressed. It appears from the State's exhibits, the last QAP on the BAC instruments in question utilized solutions prior to 07025. If this is in error, the State is invited to show the court the updated report in the exhibits.

Dated this 10 day of April, 2008

Victoria Meadows, Judge

Stephen Greer, Judge Pro Tem

INTEROFFICE COMMUNICATION

WASHINGTON STATE PATROL

TO: Barry K Logan, PhD, Director, FLSB

FROM: Edward J. Formoso, Quality Assurance Manager
Ann Marie Gordon, MS, Laboratory Manager
Washington State Toxicology Laboratory

SUBJECT: Simulator Solution

DATE: April 11, 2007

1. We met and discussed the process for preparation and certification of the simulator solutions. We found the current process to be well defined in the SOP and no changes are necessary.

2. Mr. Formoso reviewed all of the data from January 2007 through March 2007, and found all data to be accurate. The actual chromatographic data was compared to the data that has been entered into our computer system. No errors were found. The only discrepancy found was one control printout which was misfiled in the wrong folder; however the data was entered correctly. This occurred because four solutions were analyzed on the same day by the same analyst.

3. In a laboratory meeting on April 11, 2007 at 1 pm, the simulator solution protocol was reviewed. The main focus was to use care when entering data into the computer system. There is no reason to modify our protocol at this time.

4. Finally, this laboratory has prepared simulator solutions for over 20 years. No solution has ever left this laboratory with an incorrect concentration.

WASHINGTON STATE PATROL – JULY, 2007

MONDAY, JULY 9, 2007, 7:26 PM

MESSAGE #2606

Ann Marie Gordon doesn't really certify all those simulator solutions. If you look in the file you'll find a grammatigram with her name on it, but if you also check over the years of where she really was on the days that those things were certified you'll find once in a while she was in DC or Alaska, or somewhere else. She had somebody else do it and then she'll sign the forms that says, under penalty of perjury I analyzed this. If you don't think that's a big deal just think what Francisco Duarte would think of that.

END OF MESSAGE

RECEIVED
JUL 20 2007
WSD HUMAN RESOURCES

7/20/07

I AnnMarie Gordon hereby resign my position as lab toxicology manager

Simpson, Melissa (WSP)

From: Logan, Barry (WSP)
Sent: Sunday, August 19, 2007 12:14 PM
To: Simpson, Melissa (WSP)
Subject: FW: ABFT

From: Logan, Barry (WSP)
Sent: Thursday, August 16, 2007 9:03 AM
To: Sorenson, Don (WSP)
Cc: Jones, Kevin (WSP); Graham Jones (Graham.Jones@gov.ab.ca); Beckley, Paul (WSP)
Subject: ABFT

Don; Here are some updates.

I have been keeping ABFT (our accrediting board) notified about what's going on in the Tox Lab. Their accreditation program does not cover the simulator solution aspects of the lab's activities, only the blood and tissue testing. However, in the interests of openness, and since AMG was signing our reports, I've discussed inviting them in to do a data audit of cases that Ann signed out, to verify the completeness of the review. They are willing to do that, but probably not until October.

We already had an inspection in June where the lab data was reviewed and no problems with the quality of the review were identified. But this would provide additional reassurance to our customers and the public.

Could you please contact Dr. Graham Jones (780) 427-4987 who chairs the laboratory accreditation program at ABFT to discuss this further?

Thanks

BKL

(Graham; Don Sorenson heads our agency's risk management division.)

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Barry K Logan PhD, DABFT
Washington State Toxicologist
Director, Forensic Laboratory Services Bureau
Washington State Patrol
2203 Airport Way S.
Seattle WA 98134

ph: (206) 262 6000
fx: (206) 262 6018

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Washington State Patrol
Forensic Laboratory Services

Access Washington
Official State Government Web Site

Breath Test Program (BTP)
WebDMS Search Options

DataMaster Search

QA Simulator Search

Solution Batch Certifications

Search this Site

DRE Forms & Manuals

BTP Public Records Index
(NIST, Curriculum Vitae, Policies, etc.)

NOTE: Breath Test instrument records that are available on this web site extend back approximately three years. Some of the records found (i.e., case files) may extend back even further. Older records not found on this site must be obtained from the local responsible Technician.

This Web site does not contain copies of permit cards for individual operators. They must be obtained from the individual law enforcement agency with which the operator is employed.

NOTICES

February 5, 2010 - The Washington State Patrol, Toxicology Laboratory Division now provides breath alcohol measurement uncertainty estimates (confidence intervals) as a courtesy to interested parties. The Division will provide this service upon request as resources permit; however, this service will not be provided for breath test results between 0.120 and 0.149 g/210L or for results above 0.210 g/210L.

The following information must be provided with your request:

- Name of subject
- Date of subject breath test
- Datamaster Instrument number
- Duplicate breath test results
- Citation number or subject date of birth
- Name and address of requestor
- Contact information for opposing counsel (e-mail or business address)

All requests to be submitted to:

Toxicology Laboratory Division
2203 Airport Way S., Suite 360
Seattle, WA 98134
Fax: 206-262-6145

December 17, 2009 - Copies of the 'Certificate of Accreditation' and 'Scope of Accreditation' can be found in the BTP Public Records Index section on this site, under the link "ASCLD/LAB Accreditation".

November 17, 2009 - Breath Alcohol Calibration accreditation - on November 16, 2009 the WSP Toxicology Laboratory Division became accredited by ASCLD/LAB-International under the ISO/IEC 17025:2005 general requirements for the competence of testing and calibration laboratories. This

accreditation applies to the activities involved with the calibration of breath alcohol measuring instruments and the preparation of calibration reference materials (i.e. simulator solutions). Copies of the Certificate of Accreditation and Scope of Accreditation will be placed on WebDMS upon receipt.

September 1, 2009 - The WSP policies and procedures covering the certification of simulator solutions and the subsequent calibration of the evidentiary breath test instruments have been updated. The updated manuals supersede previous policies and protocols for these activities and can be found in the BTP Public Records Index on this site, under the link â€œBreath Calibration Manualsâ€.

June 19, 2008 - "Exhibit 2: Thermometers approved to measure the temperature of simulator solutions" has been updated and can be found in the BTP Public Records Index on this site

June 19, 2008 - On March 14th, Dr. Fiona J. Couper became the new Washington State Toxicologist for the Washington State Patrol. Dr. Couper's curriculum vitae can be found in the BTP Public Records Index on this site

February 12, 2008 - The Washington State Toxicologist has published the CR-103 (Permanent Rulemaking Order) for the Washington State Administrative Code Sections regarding preliminary breath testing.

Details are available at: http://breathtest.wsp.wa.gov/WAC 448-15.pdf and http://breathtest.wsp.wa.gov/WSR 08-05-029.pdf

November 20, 2007 - The Washington State Toxicologist has published proposed changes to the Washington State Administrative Code Sections regarding preliminary breath testing.

Supporting documents are available at: http://breathtest.wsp.wa.gov/Approval of Alco-Sensor FST PBT Instrument.pdf

Details are available at: http://breathtest.wsp.wa.gov/WSR 07-22-110.pdf

September 28, 2007 - The Washington State Toxicology Laboratory recently changed its procedures for preparing, testing and checking simulator solution batches, and has begun reviewing the data for solutions recently prepared. The complete analytical data, the certification data sheet, and affidavits of the analysts, for all solutions reviewed so far, and any

orrections made, are posted here

he Laboratory is continuing to review the nalytical data, certification data sheets, nd the affidavits of the analysts for revious batches. Updates will be posted veekly.

lease contact Mr. Rod Gullberg with uestions concerning any particular atches not yet reviewed.

ugust 9, 2007 - The Washington State atrol Toxicology Laboratory has contacte ounty prosecutors about an error recentl iscovered in the calculation of external tandard simulator solution reference alues. This has resulted in an verestimate by 0.001 to 0.002g/210L in ome tests conducted on a breath test nstrument in Spokane County (140030), etween February 2, 2006, and January 4 007. Details are available at: ttp://breathtest.wsp.wa.gov/Simulator solution alculation issue.pdf

uly 26, 2007 - The Washington State atrol Toxicology Laboratory prepares and ests simulator solutions used in the ataMaster breath testing instruments. ach batch of solution is prepared by a ingle analyst. Each batch of solution is hen examined and tested by multiple nalysts and each analyst signs a ertificate for use in lieu of live testimony ursuant to CrRLJ 6.13(c)(1).

ll certificates signed by Ann Marie Gordo ave been removed from this Web Based iscovery Materials Site (WebDMS) as of uly 21, 2007, because Ms. Gordon did no ersonally examine and test the solutions. his applies only to Ms. Gordonâ€™s ertificates. All other certificates remain o he website.

he test results themselves have not hanged.

uly 5, 2007 - The State Toxicologist is einitiating the process of amending the Vashington Administrative Code Section VAC Chapter 448-15 concerning approval f portable breath test (PBT) devices. lease see the preproposal statement of nquiry at: http://www.leg.wa.gov/documents/ sr/2007/12/07-12-014.htm

NOTE: Adobe Acrobat Reader is required to view PDF files on this website.
For a free download, click here.

For best printing of this page, please set your printer to landscape

VERIFICATION BY PETITIONER

I, Robin Schreiber, verify under penalty of perjury that the attached PRP is true and correct and is filed on my behalf.

March 23, 2010
Date and Place

Robin Schreiber
Robin Schreiber

Monroe Correctional Complex
PO Box 777
Monroe, Wash 98272-0777

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re Personal Restraint Petition of ROBIN SCHREIBER, Petitioner.	NO. 40553-9-II PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I. IDENTITY OF MOVING PARTY

Robin Schreiber, Petitioner, seeks the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Waive the filing fee and other costs associated with Petitioner's *Personal Restraint Petition.* A copy of Petitioner's *Statement of Finances* is attached.

III. FACTS

Petitioner is an indigent defendant who seeks to file the attached PRP. Due to his indigence, Petitioner seeks to have the filing fee and other costs waived.

III. ARGUMENT

Pursuant to RAP 16.8, Petitioner respectfully requests that this Court waive the filing fee and other costs associated with his *Personal Restraint Petition.*

IV. CONCLUSION

This Court should waive the filing fee and other costs in this case.

DATED this 7th day of April, 2010.

Jeffrey E. Ellis, WSBA #17139
Attorney for Mr. Schreiber

705 Second Avenue, Suite 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (*fax*)
JeffreyErwinEllis@gmail.com

CERTIFICATE SUPPORTING MOTION TO PROCEED IN FORMA PAUPERIS

I, Robin Schreiber, certify as follows:

1. That I am the Petitioner and I wish to file the enclosed PRP.

2. That I own:
   (X) a. No real property
   ( ) b. Real property valued at $_____.

3. That I own:
   R.S. (X) a. No personal property other than my personal effects
   (X) b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at $ 16.62.

4. That I have the following income:
   R.S. (X) a. No income from any source.
   (X) b. Income from employment, disability payments, SSI, insurance, annuities, stocks, bonds, interests, etc., in the amount of $ 40.00 on an average monthly basis. I received $ 440.00 after taxes over the past year.

5. That I have:
   (X) a. Undischarged debts in the amount of $ 58,000. LFO
   ( ) b. No debts.

6. That I am without other means to prosecute said appeal and desire that public funds be expended for that purpose.

7. That I can contribute the following amount toward the expense of review: $ 0.

8. The following is a brief statement of the nature of the case and the issues sought to be reviewed: See attached brief.

9. I ask the court to provide the following at public expense, the following: all filing fees, preparation, reproduction, and distribution of briefs, preparation of verbatim report of proceedings, and preparation of necessary clerk's papers. I do not seek appointed counsel. Instead, Jeffrey Ellis has agreed to represent me in this matter.

10. I authorize the court to obtain verification information regarding my financial status from banks, employers, or other individuals or institutions, if appropriate.

11. I certify that I will immediately report any change in my financial status to the court.

12. I certify that this PRP is being filed in good faith.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

March 23, 2010
Date and Place
Monroe Correctional Complex
PO Box 777
Monroe, Wash. 98272-0777

Robin Schreiber
Robin Schreiber